

Back up your case

By Chris Dolan



Editor's note: This is the first installment of our newest column, The Savvy Litigator, which is intended as a spritely and enlightening repository of the best tips of the trial lawyer trade. If you have an interesting story that illuminates a sage technique or best practice, send it to The Savvy Litigator, c/o Forum Managing Editor Sharon Scott, sharon@caoc.org.

In this era when the television show CSI remains a big hit and the average juror expects your case to be dished up as it is on TV, we become more and more dependent on technology to meet our burden of proof. For those of us who have been at this a while, before PowerPoint and projectors, our major concern was that our magic markers would fail or that our butcher paper or blown up exhibit would fall off the easel. While technology is, indeed, a valuable tool just like your computer, it is subject to inevitable and unexpected failure. Therefore you must always have a "Plan B," for that horrible moment when your visual presentation fades to black.

To provide you with some disaster preparedness, I am going to share a couple of "pucker" moments that I experienced—and survived—during trial. The first example is one involving the use of video testimony in trial. The second has to do with power failure during closing arguments.

As you know, experts often appear in trial through video due to scheduling issues and the high cost associated with live expert testimony, which can run upwards of \$10,000 per day. In one particular trial, in Alameda County, before DVDs existed, my orthopedic expert was to appear by way of a videotaped deposition. CCP

§ 2025.620(d) provides that a party may with proper notice record an expert's deposition for use at trial.

On the morning I was to present the expert's testimony, the videographer still had not finished her edits, despite promising to have the video available to me the night before. I waited through the morning and into the lunch hour. Finally, as the afternoon session commenced the judge asked me: "Mr. Dolan do you have any more witnesses or do you rest?"

You must always have a "Plan B."

I was ready to go with my backup plan – using the transcript. But as if on cue, the videographer came rushing through the door and handed me a VHS tape. I popped it into the player and dramatically stated, "I call Dr. X as an expert witness by video." I hit play. But nothing appeared except snowy white static. Finally, an image snapped on screen. To my horror, it was not the expert's face. You can imagine my immediate concern as to where this was headed.

It was, indeed, a home movie involving physical contact. But, thankfully, it was of the videographer's son's football game.

I looked at the videographer with concern and she looked back mortified. A few seconds later, it turned to snow again, and then the expert's image appeared. I kept my lunch down, turned to the jury, and said "it could have been worse" and they all laughed. So I learned several lessons: 1) make sure the video is provided at least 48 hours in advance; 2) review it in

total; 3) have the transcript in court with someone to read; 4) be ready with a joke to diffuse the situation should it go haywire.

The second episode was during a closing argument in San Francisco in a multi-million dollar compartment syndrome case. By this time PowerPoint was in vogue and I was using it to walk the jury through the facts of the case and how my client should win hands down. It was going great up until the point that the computer crashed and the projector went solid black. My heart sank for a moment. Luckily, I had backup. I turned to my associate and said "shift to the Elmo," a lower tech option that we had at the ready. As he did so I said to the jury, "You know how trial lawyers die in closing argument? Equipment failure." Again, they gave me a chuckle and, within 30 seconds, we were back up and running using the hard copy printout of the PowerPoint that I had printed out.

The lesson I learned from this was to have a physical backup at the ready, at all times. Indeed, when we go to trial in a department that provides a projector, we bring our own in case of equipment failure as the judges often state that while they may provide the equipment, they cannot guaranty its reliability and will stop the trial should it fail.

Although the new methods are indeed invaluable in presenting your case, the old-school methods may save it, and you. ■

Chris Dolan is the owner of the Dolan Law Firm with offices in San Francisco, Oakland and Sacramento. He is a former President of CAOC and a winner of the CAOC Consumer Attorney of the Year award. www.cbdlaw.com