

By Judge Nancy Gertner

High Tech Courtrooms



Hon. Nancy Gertner was appointed to the United States District Court (Mass.) in 1994 after a twenty-year career as a prominent criminal defense lawyer and civil rights activist. She has been the Charles A. Merriam Distinguished Professor at Arizona State Law School and visiting professor at Harvard Law School, and presently teaches at Yale Law School. Among other international efforts, she has been on the faculty of the American Bar Association - Central European and Eurasian Law Initiative. A graduate of Barnard College and Yale Law School, she has written widely on various legal issues.

At an early demonstration of what has come to be known as "high tech" evidence, Sonia Hamlin, author of *What Makes Juries Listen* (1985), urged the lawyers to make maximum use of the new technology in their jury presentations. More and more jurors, she said, were members of "Generation X," used to getting their information through screens -- television or video. Since that was what they expected, that was the most effective means of communicating with them.

I was captivated and skeptical all at once. It is true that jurors -- whether "Generation X-ers" or not -- were getting more and more used to seeing information through screens. It is also true that technology had clearly enhanced lawyers' abilities to communicate with jurors, making the old discussions of "demonstrative aids" seem almost quaint.

But Hamlin's observations were only part of the story. My concerns were not just with the effective communication of information, as in a newsclip. That was the *lawyer's* focus -- transmitting their side's point of view in the most persuasive way. As a *judge* I was concerned with empowering jurors to be decisionmakers. Court contests, unlike television shows, often involve multiple narratives, two or even more versions of the facts. Jurors are charged with being active listeners in the sense that they have to evaluate credibility, and critically analyze the information stream. And in fulfilling their complicated role, high tech presentations were useful but with some caveats.

In *United States v. Nippon*, a criminal antitrust case, I saw both the advantages and the disadvantages of technology. The government sought to take the testimony of a critical witness in Japan through either a videotaped deposition that would then be replayed to the jury or through the use of videoconferencing. The defendant objected to the video deposition, but agreed to videoconferencing.

The difference between a videotaped deposition and videoconferencing was significant. A videotaped deposition involves an offsite deposition of a witness, recorded and transcribed by a court reporter. The deposition is attended by counsel for both sides who raise objections and examine the witness. The tape can be edited, and, if the Court rules that the witness' testimony is admissible, all or some of the videotape is played before the jury during trial.

Videoconferencing offers many of the same advantages of a videotaped deposition but with additional characteristics. It enables an off-site witness to testify "live" during a trial, to be examined in real time by the lawyers, with the trial judge presiding, even in front of the jury. In *Nippon*, the defense contended that the witness had given equivocal answers in prior interviews. Without judicial oversight, the prosecution could more easily shape the witness's testimony outside the presence of the jury. To be sure, the use of either technique, in lieu of live testimony at trial, plainly raised Confrontation Clause issues, which were avoided when both parties consented.

The witness testified at 6 a.m. Japan time, and 7 p.m. Boston time, out of the presence of the jury. I ruled on the parties' objections; when they were sustained, the tape was edited and presented to the jury the next morning.

The government also used a variety of high tech equipment - exhibits on CD presented through screens in the courtroom, or through a document camera. The defense used the traditional "demonstrative aids" - blow ups of the relevant documents - or ordinary paper exhibits. Mid-trial, I suggested that the parties merge the approaches: give the jurors a book with the relevant exhibits. Use the high tech approach to direct their attention to the particular references.

At a briefing after the trial, attended by all parties, the jurors indicated that they preferred the "mixed approach." When documents are on a screen, and the witness points out the relevant portions, the jurors lose the ability to learn at their own speed. In the past, a juror could pause to read a given document as it was passed from one to the other. Or a juror would be given a book of documents, enabling him or her to read the document before or after. With high tech presentations, the lawyer controls the pacing, which may not enhance understanding -- at least for some jurors. Having both alternatives was enormously helpful.

However, there are some other considerations. High tech evidence changes lawyers' preparation. On the one hand, high tech preparation requires considerable advanced work, even more than in the usual case. On the other hand, some lawyers, mesmerized by the bells and whistles, think that all they need to do is to press buttons. They use the technology as a crutch and stop looking at the jury or interacting with the witnesses.

High tech presentations offer significant potential for distortion. The *New York Times* recently reported that in a PowerPoint presentation given by NASA engineers to describe their investigation into the impact of the foam that struck the Challenger's wing, a critical piece of information -- that the actual piece of foam was dramatically larger than anything that had been tested -- was relegated to the last point on the slide, and plainly underestimated.

Finally, there is a disjunction between the so-called "courtroom of the twenty-first century" and the jury deliberation room of the nineteenth century. More and more evidence is presented through high tech means, while the jury is still relegated to pencils and flip charts. One hundred years ago, jurors were not permitted to take notes because of the concern that the more educated among them would then dominate. Are we inviting the same problem by introducing technology into the jury room? Will the more technologically savvy members lead the jury?

Nevertheless, I am prepared to count these issues as part of the growing pains of a new approach. Over time, lawyers will learn that high tech tools are part of the menu of tools at their disposal. Sometimes PowerPoint is appropriate; sometimes an old-fashioned blackboard and squeaky piece of chalk is a more effective approach. Sometimes it is better to give the jurors notebooks with the exhibits while pointing out the relevant portions on the screen; sometimes an entirely electronic approach is best. ■