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Trial advocacy in the modern world

By: F. Dennis Saylor IV and Daniel I. Small September 17, 2015

In 1924, Clarence Darrow defended Nathan Leopold and Richard Loeb, the teenage sons of wealthy Chicago families who were accused of killing a 14-year-old boy. In what was called the "trial of the century," Darrow gave a closing argument that lasted for 12 hours. He succeeded in saving the defendants from execution. The closing was so popular that it was published in various editions for years afterward.

It may have been brilliant, but it sounds bizarre by today's standards. We live in a different world than 1924, or even 2004. A series of technological changes — most notably, the development of television and the internet — have revolutionized how we communicate with each other. In recent years, technological change has exploded. Facebook, for example, is barely 10 years old, but it has more than a billion users.

Somehow, though, trial lawyers have largely lagged far behind. Three trends in recent years have dramatically changed how lawyers should approach courtroom advocacy.

1. The digital revolution

Developments in technology have profoundly affected the courtroom in multiple ways, good and bad. It is dramatically easier to organize and display evidence, and there is often more evidence (such as emails and texts) from which to choose.

Today's jurors are accustomed to, and expect, high-tech presentations and visual imagery. The idea of standing up in front of a jury, or any group of people, and just talking for 12 hours is unimaginable. No judge would allow it, and no one would be listening anyway. But talking for an hour, or even half an hour, without visual aids — without letting jurors see any images (or hear any recordings) — is just as out of date.

But beware of getting too caught up in the technology — or too lazy — to use it effectively. For example, just because you can show lots of documents, and show them quickly, doesn't mean that you should. Too often we see lawyers flashing too many documents across the screen too quickly, like a strobe light, losing whatever impact the documents may have had, and leaving the jurors far behind.

Using technology requires just as much judgment, strategy and common sense as old-fashioned paper, and maybe more. Having more options requires making more choices, which requires more thought and planning.

2. Short attention spans

We now live in a short-attention-span world, in which it is hard to focus anyone's attention on anything, and harder yet to hold it for any length of time. After all, if you can't say it in a 140-character tweet, is it worth saying?

Trial lawyers must examine and adapt each stage of the trial in that light. Long stretches of question-and-answer may be effective in a deposition. It is not effective with a jury. Testimony has to be broken up into bite-sized pieces, with exhibits, demonstratives or other tools to help deliver information — and deliver it with impact.

The same applies to openings and closings. Too many lawyers seem stuck in the past: speaking in ponderous jargon, rarely interrupting with visual images, and droning on well past the point at which the average juror is paying attention.

3. Lack of trial experience

All of this is made much worse by the nearly universal lack of meaningful trial experience. Clarence Darrow went from corporate lawyer to labor lawyer to criminal lawyer in his career. And yet he still tried what today would be considered a huge number of major criminal cases, including more than 50 murder trials. But today there are fewer

opportunities, and many more lawyers. Over the years, in both civil and criminal law, the number of trials has declined sharply while the number of lawyers has increased exponentially.

Today, a majority of litigation attorneys have little or no trial experience, and even those who do don't have as much as they need or would like. The reasons for this are many, including the fact that trials are expensive, unpredictable, risky and often have severe collateral consequences.

Whatever the reasons, the result is clear: Trial experience is increasingly rare. Becoming a litigation partner at a major law firm despite little or no actual trial experience is now commonplace. And if we exclude the criminal bar, far too few lawyers under the age of, say, 45, have any meaningful trial experience at all.

The training of lawyers is too often trapped in the past. It is pointless to tell new lawyers that they need more experience. The real challenge is finding creative and productive ways to get them experience, and figuring out how to do a credible job without it. And a big part of that is training lawyers to adapt to modern technology, and modern audiences.

Jurors are real people, snatched out of real lives and placed into an artificial environment for a few days or weeks. They expect (and deserve) to be communicated to in ways that they can understand. To try cases in the modern world, lawyers must understand and adapt to the realities of our world with an open mind. After all, you can't persuade people if they aren't paying attention.

Judge F. Dennis Saylor IV sits on the U.S. District Court in Boston. Prior to taking the bench in 2004, he was a federal prosecutor and an attorney in private practice. He teaches trial advocacy at Boston University School of Law. Daniel I. Small is a partner in the Boston and Miami offices of Holland & Knight. A former federal prosecutor, he is the author of "Preparing Witnesses" (ABA, 4th Edition, 2014), and teaches CLE programs around the country. He can be contacted at dan.small@hklaw.com.