

## **Technology in the Courtroom**

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This discussion will first introduce attendees to two useful iPad apps. Second, a brief overview of video conference technology will be provided that describes how video conferencing can be used both in deposition and at trial. Finally, the discussion will close with some overall advice on when and how to use technology during trial.

### **Pretrial Litigation Apps**

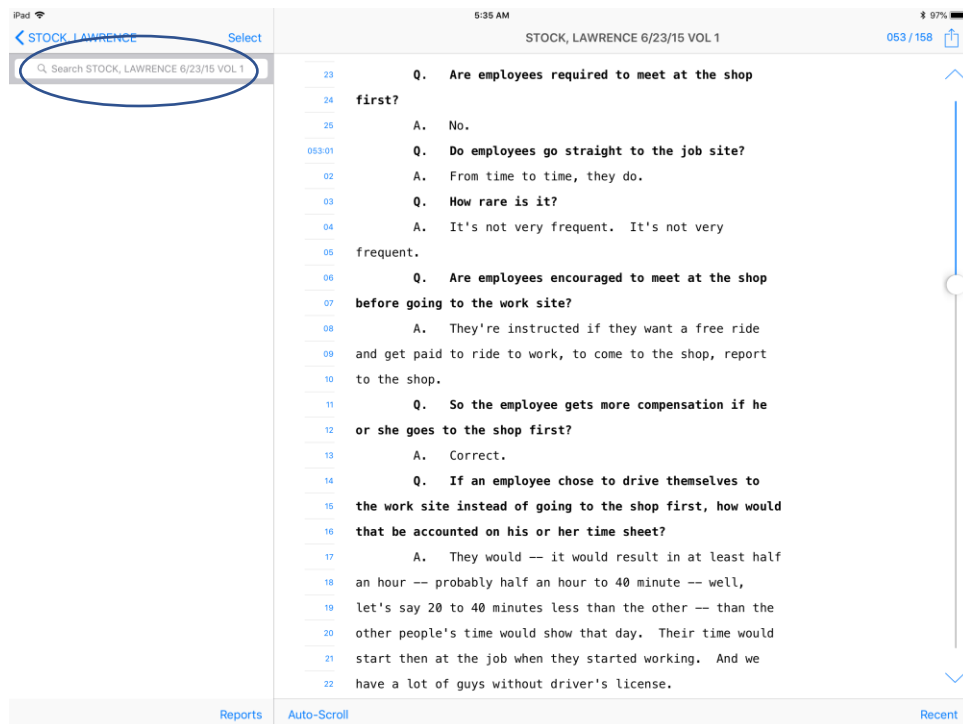
TrialPad has become a leading trial presentation software. However, the makers of TrialPad have two other applications that equal, if not exceed, the utility of TrialPad: TranscriptPad and DocReviewPad. Like any computer program, both of these apps take a little time to master. But when used properly, both programs can provide significant savings in both time and money.



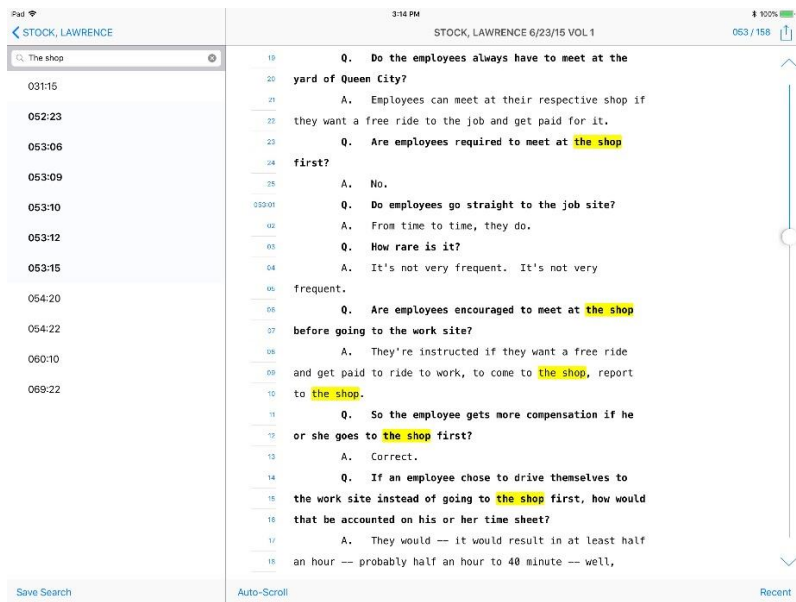
## TRANSCRIPTPAD

TranscriptPad allows users to import deposition, hearing, and trial transcripts into their iPad for easy review, searching, highlighting, and reporting. Transcripts are imported into the program using the “.txt” ASCII files that most court reporters now provide without additional charge. Alternatively, such an ASCII file can be created from the e-Tran (.ptx) format that most attorneys have become familiar with.

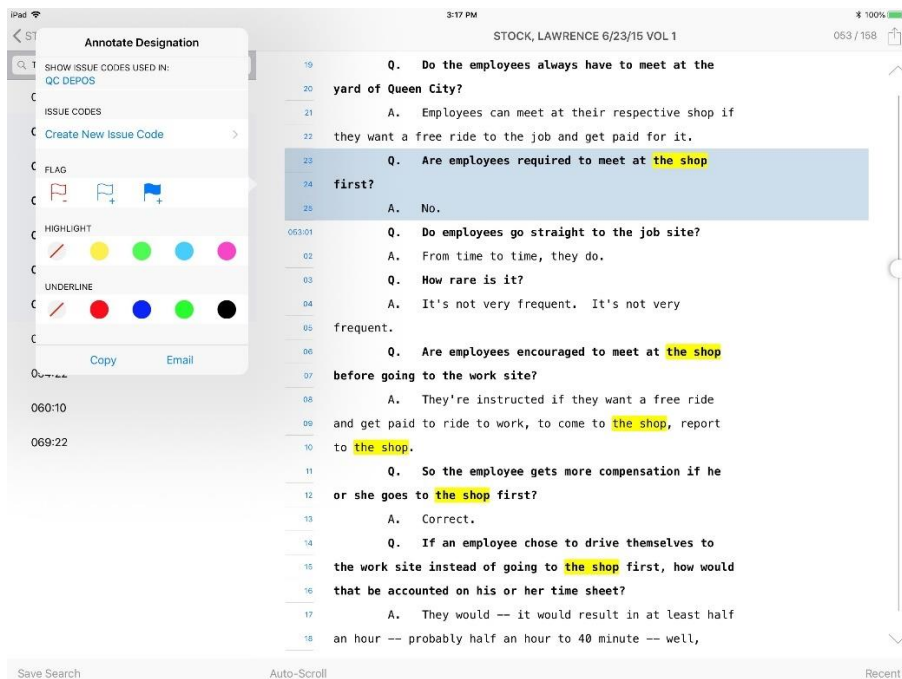
When a user imports a new transcript into TranscriptPad, they are organized into Cases. Proper case organization is important because TranscriptPad’s search functionality can be run cases-wide or within just a single transcript. To use the search functionality, a user simply inputs the search term in the left column.



Once a search-term is entered, users can quickly click through the results by line and page numbers:



Additionally, users can add highlights, underlines, or Issue Codes by tapping a “beginning line number” followed by an “ending line number.” This will launch a menu that can allow various mark-ups on the transcript just as could be done with a pen and paper transcript.



TranscriptPad can then create reports based on these various mark-ups or combinations of mark-ups.

Finally, TranscriptPad allows users to input PDF versions of exhibits. It takes a little extra effort to properly organize exhibits so that they match-up with the correct transcripts. However, that effort allows a user to quickly refer to exhibits without having to dig through a separate file or consult an overall exhibit index.

The overall best feature of TranscriptPad, at least for me, is the ability to travel with multiple transcripts. At one time, I had over 400 deposition transcripts on my iPad. That many paper files would have filled half a dozen or more bankers' boxes. By centralizing all of the transcripts that I was potentially working with at that time to my iPad, I was able to take multiple deposition transcripts to wherever I might be working on a given day.



## DOCREVIEWPAD

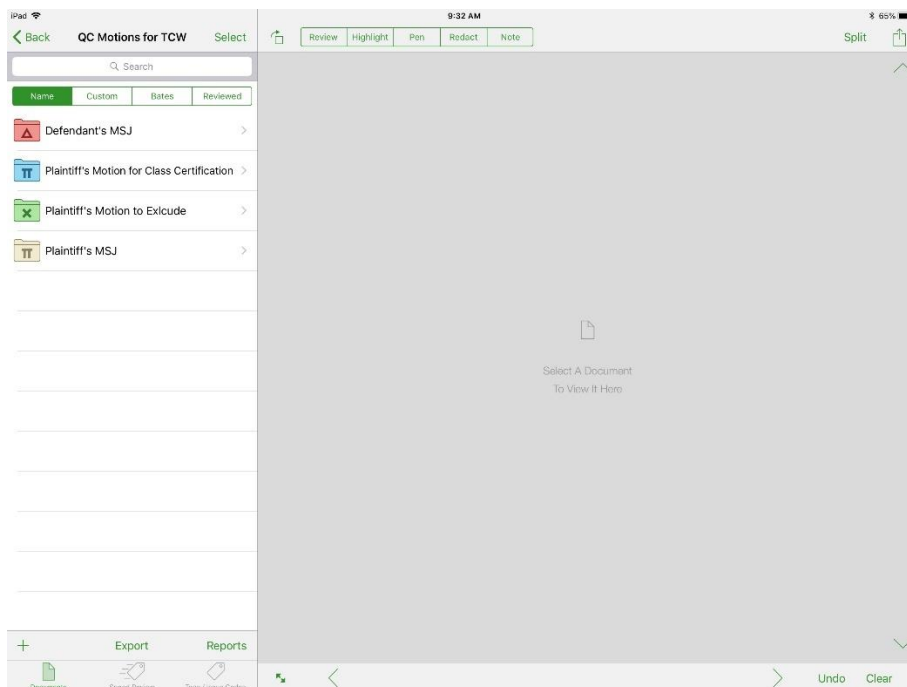
DocReviewPad is probably the least-known but most versatile of the LitSoftware suite of legal apps. At its root, DocReviewPad allows a user to load, review, and mark-up PDF files. GoodReader and Adobe Acrobat for iPad are often used for these basic features as well. But DocReviewPad can also do a great deal more.

As the name suggests, the app was designed as a discovery review device. And it works great for that. However, I find that I use it more for reviewing pleadings and preparing for hearings. A description of how I use DocReviewPad in hearings follows.

As an initial matter, the reason I use DocReviewPad for hearings is that I can easily store hundreds, if not thousands, of pages of pleadings and exhibits on my iPad without

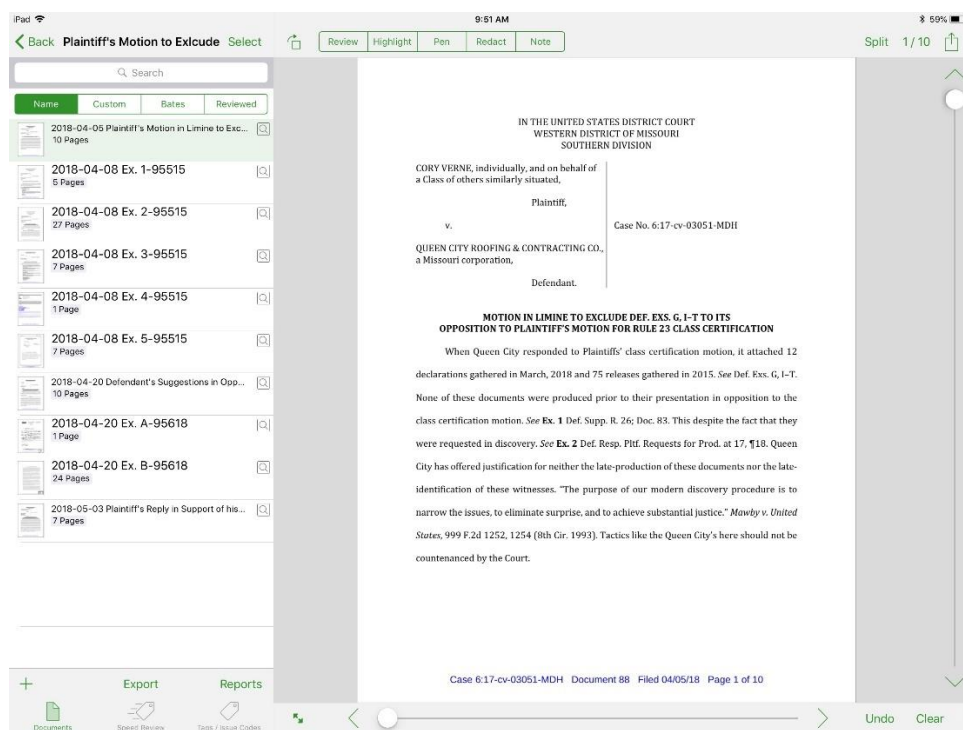
having to lug around multiple binders or even bankers' boxes full of documents. Properly organized, I also find that I can much more readily work with multiple documents in a file.

DocReviewPad uses an intuitive file-folder organization system. Just as with organizing documents on a server, desktop computer, or even a in a traditional paper-file cabinet, care should be taken to separate documents into folders that make sense without imposing so much structure that the system become unwieldy. For example, when I am preparing for a hearing with multiple motions, I will organize each motion into its own folder:



Properly organizing documents into DocReviewPad does require a little planning and effort to work effectively. But that effort can easily be off-loaded to a staff member. Ultimately, I have found the key is to plan to spend some time working with the PDFs' organization *after* I have them loaded onto the iPad. This allows for more control and lets me tweak the organization so that it is most useful to me for whatever purpose I have planned.

As a default, our office names every electronic file with the date of the document. This provides a number of benefits but it particularly works well with DocReviewPad because the apps' default sorting mechanism is strictly alphabetic. Using descriptive names allows me to quickly find a particular pleading or exhibit.



Navigation within DocReviewPad is also easy. Swiping left-and-right allows a user to turn the pages within a particular document. Swiping up-and-down flips through to the next or previous document in the list to the left.

Mark-up options are at the top. Personally, I find the investment in an iPad Pro with Apple Pencil worthwhile and makes the mark-up process very easy. Documents can be exported out of DocReviewPad either with or without mark-ups.

DocReviewPad's best collaboration feature, though, is the "Notes" option. Ultimately, DocReviewPad's notes allow a user to put a virtual sticky-note onto a PDF. In particular, I find that using the iPad's built in voice-to-text feature in conjunction with these notes is very

effective. The built-in transcription is probably not good enough for large-scale document production, but it is generally good enough for quick thoughts and notes about a particular document.

For example, I was helping another attorney prepare for a deposition. He had already culled down to the documents that he was potentially going to use as exhibits. I loaded these documents into DocReviewPad and made notes where appropriate. In some instances, I left notes about whether and when I would suggest using this document during the deposition. In other instances, I dictated off a short series of questions that I thought would be helpful for a given exhibit. DocReviewPad can then create a report for a particular document, or a set of documents, listing out all of the notes you have made as well as identifying any pages of the documents that have been assigned a note or particular issue code.

Finally, DocReviewPad has an internal search feature that will allow it to perform basic word-searches of any PDFs loaded into it that are themselves text-searchable (i.e., not just image-file PDFs). This can allow a user to quickly figure out which exhibit to direct a court to without having to try to flip through the file on-the-fly during argument.

Currently, the cost for each of these products is roughly \$90 each. For me, there is no question that they are worth the cost.

## **A Primer on Video Conference Technology**

Video conferencing has been in wide-scale use since the 1990s. Since that time, the technology supporting video conferencing has continued to improve such that it is now possible to hold high-quality, stable video conferences with multiple users from almost anywhere, so long as all participants have a sufficiently high-speed internet connection.

There are basically two-types of video conference systems: (1) standards based; and (2) web-based. There are pros and cons to each type of system. And in my opinion, the type of video conference system an attorney should use will depend on (1) whether it is being used for trial or deposition; and (2) how exhibits are going to be handled.

Most traditional video conference-enabled board rooms use what are referred to as “standards based” video conference (a/k/a telepresence) system. These arrangements can be great for court-room testimony in that they often have higher-quality cameras and microphones. And such rooms can impart as sense of formality that is appropriate for a courtroom presentation.





The major drawback from a system like the one pictured above, however, is that it is basically impossible to use on-screen exhibits. If you have ever sat in a boardroom and had someone display an email or word document across the room, then you know both how distracting it is to try to read at that distance and how impossible the task often is. As a result, I have found that web-based video conferences using a laptop computer usually works easier – particularly for deposition.

In recent years, tremendous strides have been taken in web-based video conferences. Skype, Google Hangouts, and other consumer-grade products have been readily available for years. But in my experience, those systems do not have the back-end “muscle” to provide the sort of reliability that litigation demands. However, there are commercial- and enterprise-grade products now available that work well enough for most applications.



I have used all three of the web-products above for video depositions. Each has provided clear video and crisp audio, so long as everyone involved had a stable internet connection. To me, the secret to that connection is to use a wired ethernet connection rather than using a wireless wifi connection. Wifi is great and that technology continues to improve as well. But any number of variables can degrade the quality of a wifi connection whereas

most wired connections are stable so long as there are not too many users on the same network.



This photo shows a common deposition set-up (from the witness's side). [Note the blue ethernet cable coming out of the side of the laptop]. I have always scheduled the court reporter to sit with the witness and I think most reporters prefer that. Having the reporter with the witness also provides a neutral "observer" in the room that I think helps cut-down on inappropriate conduct from other attorneys who may be in attendance. Further, most court reporters will, provided they have sufficient notice, bring a laptop for the witness to use. And most court reporting services will arrange the video conference software session if a firm does not have its own subscription.

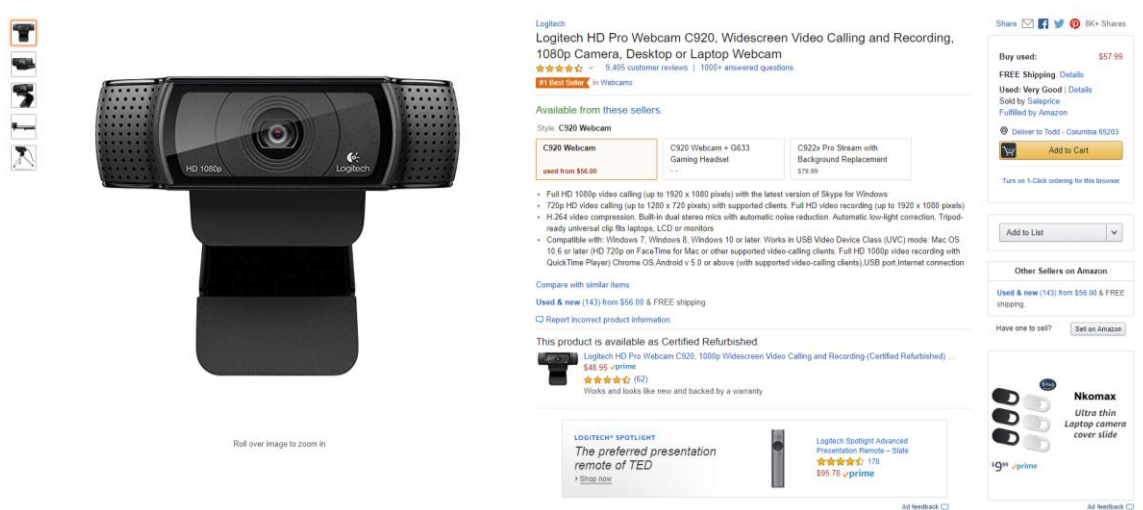
## Hardware

As with all technology, hardware matters. So, I want to make a few specific suggestions based solely on my own experience as of the time of this writing (June, 2018).

Most laptops have a built-in webcam that I find will work pretty well. Pictured above is an external camera connected by USB port. Such external cameras can provide a better visual image, but it is critical they be tested in advance of the testimony. It is not uncommon for external cameras and microphones to require a little set-up work that will vary between specific laptops on a machine-to-machine basis.

The webcam shown above in the example deposition also has an external microphone. Again, most laptops have internal microphones that work pretty well. However, those microphones tend to be very directional. This means it is important that the speaker talk directly into the microphone (which is usually centered at the top of the screen). On the other hand, most external webcams with integrated microphones have a broader physical range they will pick-up from.

When I take a video conference deposition, I do it from my desk using a Logitech c920 mounted to the top of my monitor and an MXL Condenser Microphone that sits on my desk.



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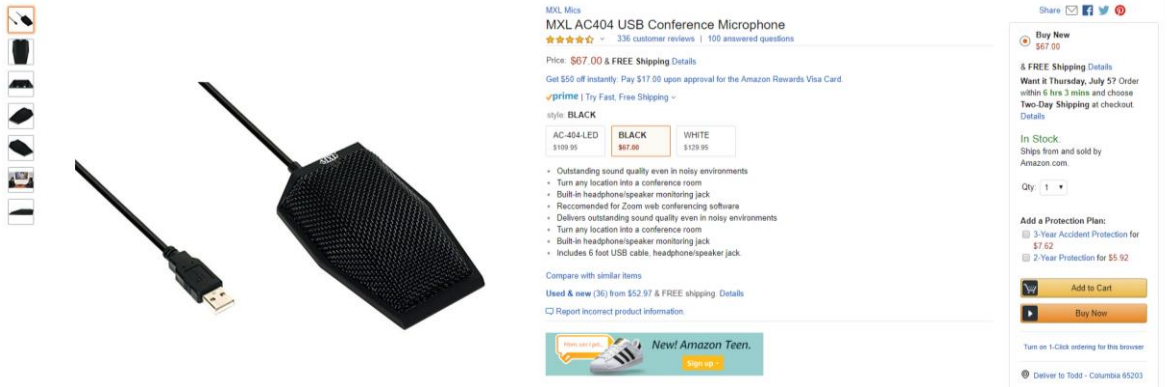
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While my webcam has its own microphone, I have found that a separate dedicated microphone greatly improves the sound quality. The condenser mic sits on my desk like a corded paperweight and has a low enough profile that I usually do not notice it is there.

A final suggestion regarding audio: Most of the web-based video conference systems will give users the option to audio-connect through a telephone dial-in or through the computer system. If at all possible, choose “through the computer.” While the telephone system may seem more familiar, the sound almost never syncs correctly with the video. And unless a dial-in user is very careful during the set-up, most video conference systems will think a person’s video feed is a different person from his or hers audio feed. This becomes important because most web-based systems use an “auto-director” that switches to the active speaker. This means that when the attorney is talking, his or her picture is the primary image. When the witness speaks, the image switches to the witness. If the audio and video feeds are separated, then a blank avatar will usually display for whomever is speaking over a telephone – which can defeat the entire purpose of holding a video conference.

## Exhibits

Probably the hardest thing to become proficient with when using videoconference testimony is how to use exhibits. To my view, there are three basic ways to handle exhibits: (1) shipping paper exhibits to the witness or court reporter in advance; (2) using the screen-sharing feature available in most videoconference systems; (3) using a specific litigation-oriented software package.

To my mind, the best way to handle exhibits is to ship them to the court reporter in advance of the deposition. In this way, you can have multiple copies of the exhibits available at the witness's location. While exhibits can be pre-marked, I prefer to send them to the reporter in separately lettered folders. In that way, I can call for particular exhibits when I want to use them and I can keep the exhibit numbering in order regardless of how they come in. *E.g.*, "Mr. Court Reporter, please mark the document in Folder C as Exhibit 5." This approach will work regardless of whether a standards-based video conference room or a web-based laptop is being used.

The second approach – and the one I use most frequently – is to use a screen-share to show witnesses a PDF file on their screen. This gives me the most control over the exhibits and does not require the cost, or lead-time, required to ship exhibits out in advance. With a little practice, most of the web-based systems will allow you to switch from a video feed produced by your camera to a shared window on your monitor. In this way, both you and the witness can look at the same document at the same time. I have an electronic exhibit "Stamp" that I can apply to the exhibits using Adobe Acrobat to mark them as I go.<sup>1</sup>

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<sup>1</sup> The stamp I use can be downloaded, with installation instructions, at: <http://blogs.adobe.com/acrolaw/2009/05/add-dynamic-exhibit-stamps-in-acrobat-using-a-free-stamp-set/>

There are two primary drawbacks to using screen share. First, it is not easy to let the witness control the document and scroll through it. As a result, I usually make a big deal out of instructing the witness to tell me whatever part of the document he or she wants to see so that the record is clear that I am giving the witness a fair chance to review the exhibit. Second, there is no easy way to “hand a copy” of the exhibit to opposing counsel as you are going along. I have dealt with this by sending opposing counsel a download link with the exhibits a few minutes before we get started with well-more “potential exhibits” than I plan to actually use. This way, there is not time for the other lawyer to analyze each document and review it with the witness in advance. If I have a particularly hot document that I want to be able to surprise the witness with, I will hold it back and email it to opposing counsel as I am bringing it up for the witness. If it is that critical of a document, then I am probably not going to do the deposition by video conference anyway, or I will be sure to ship it to the court reporter sufficiently in advance.

The final way to handle exhibits is a bit of an emerging technology. There are a couple of different systems available that build the exhibits into the video conference itself. One local example is Alaris Online. These systems allow an attorney to pre-load PDF files into the online system and then work with them during the hosted video conference deposition much like using the courtroom evidence presentation software available in most federal and some state courthouses. These systems can work well for attorneys who prefer to have someone else manage the technology.

## Rules Regarding Video Conferencing

Multiple Missouri Court Rules specifically reference video conference testimony in a number of ways. *See, e.g.*, Sup. Ct. R. 6.02 (regarding ADR conferences); Sup. Ct. R. 37.04 (regarding Municipal Court hearings); S.D. Ct. App. Special Rule 1 (allowing video conference oral argument from specific sites). And Missouri cases have embraced video conference as a tool to provide access to the Courts. *See, e.g., McNeal v. McNeal-Sydnor*, 472 S.W.3d 194, 201-02 (Mo. 2015) (Stith, J., dissenting). However, Missouri does not have a broad rule allowing video conference testimony in deposition or trial. Therefore, its usage will be governed by the preferences of the trial judge. As such, if video conferencing is going to be needed, it is advisable to involve the court as soon as possible to avoid surprises.

On the other hand, the Federal Rules of Civil Procedure specifically allow video conference testimony for good cause shown. *See Fed. R. Civ. Proc. 43(a); see also Parkhurst v. Belt*, 567 F.3d 995 (8th Cir. 2009) (affirming use of video-conference testimony and explaining that civil cases do not implicate Sixth Amendment confrontation clause issues present in criminal cases).<sup>2</sup> The federal “good cause shown” standard for allowing video conference testimony provides flexibility to the trial judge. *See Sprint Nextel Corp. v. Yoak*, 2014 U.S. Dist. LEXIS 166881 (E.D. Mo. Dec. 2 2014) (Fleissig, D.J.). There is an older advisory committee note, however, that states a default preference for video-taped depositions over video conference.

The federal subpoena rule allows an individual to be commanded to appear at a remote location to give video conference deposition. *See Fed. R. Civ. Proc. 45* (Notes of

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<sup>2</sup> Note: This presentation is oriented towards civil practitioners. There are complex Sixth Amendment Confrontation Clause issues to be weighed when considering the use of video conference technology in a criminal proceeding.

Advisory Committee on 2013 Amendments: “When an order under Rule 43(a) authorizes testimony from a remote location, the witness can be commanded to testify from any place described in Rule 45(c)(1).”). But the order of operations is important. *See Wagner v. Gallup*, 2014 U.S. Dist. LEXIS 84188 (D. Minn. June 20, 2014) (quashing subpoenas and sanctioning attorney for issuing subpoenas to remote locations to take video conference testimony without having previously received permission to present testimony in that manner).

### **Closing Advice Regarding the use of Courtroom Technology**

Technology can be a powerful aid to a trial attorney. But technology can be distracting as well; both for the audience and the presenter. Accordingly, trial attorneys should spend at least some time considering how tech will be both used and perceived by others. And others’ perception should be considered both from the perspective of when the tech is being used center-stage as well as when it is supposed to be off-stage.

The Law of Unintended Consequences and the maxim, “the jury is always watching,” both apply to the use of any technology in a courtroom. For instance, the iPad app, TrialPad, is an excellent tool. However, it requires members of the trial team to work on an iPad throughout the trial. Counsel should be careful about what it looks like to a jury if counsel is flipping through to find an exhibit during a break or while the other side is presenting. What may just be someone looking for the next rebuttal exhibit can appear to a jury to be that same attorney checking his or her email in the middle of the trial. This can be particularly angering to jurors since at least half of them are experiencing the longest period of separation from their phone they have endured in years.

Another example is the overuse, or perhaps a better term is misuse, of photographs on video screens during testimony. Through television and movies, American society has



been trained to stare at screens for hours on end. As a result, if a photograph, diagram, video, or animation is put a screen, then the jury will probably stop listening and look at it. And this is often exactly what is desired. But counsel should remember that most jurors can only take in information through one sensory channel at a time (*i.e.*, either visually or auditorily). That is, if a person is reading, then he or she is probably not also listening. As such, over-displaying visual exhibits can also prevent the jury from absorbing other information. Care should be taken to display exhibits when they are needed but to put them away when they are not.

Just as Americans have been trained to watch video screens, they have also been trained to fall asleep watching them. A 2014 survey commissioned by LG Electronics USA and published by the Sleep Review showed that 61% of Americans fall asleep with a television on. As such, counsel should be very careful with the length of any video presentation.

Finally, in preparing for this presentation, I conducted an unscientific survey of a number of trial attorneys from around the state about what they liked and disliked about technology in the courtroom. From these discussions, a common theme emerged. That is, the value of using traditional board-and-easel exhibits, flipcharts, white boards, and other tangible things that have a physical substance beyond just appearing on-screen. These tangible presentation devices give the jury something to connect with and can help to disrupt the lullaby effect that can be caused by too much time with a video screen. Accordingly, my last suggestion is to submit that just because there may be a technological solution available, does not mean that it will always be the best solution.