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Elizabeth L. Browning
Browning and Compnay

Theodore D. Ciccone
Litigation Communications, Inc.

Robert M. Parker
United States District Court for the Eastern District of Texas

Robert F. Ruyak
Howrey & Simon

Fred H. Cate
Indiana University School of Law, fcate@indiana.edu

Panel Three: Demonstration and Discussion of Technological Advances in the Courtroom

PANELISTS: ELIZABETH L. BROWNING, ESQ., President, Browning and Company
THEODORE D. CICCONE, President, Litigation Communications, Inc.
THE HONORABLE ROBERT M. PARKER, Chief Judge, United States District Court for the Eastern District of Texas
ROBERT F. RUYAK, ESQ., Howrey & Simon

MODERATOR: FRED H. CATE, Associate Professor of Law, Indiana University School of Law–Bloomington; Director of Research & Projects and Senior Fellow, The Annenberg Washington Program

MR. CATE: To follow from Michael Bromwich's question from the last panel, almost two years ago The Annenberg Washington Program convened a forum on the impact of press and media coverage on selecting juries. Judge Stanley Sporkin was sitting up here and Judge Abner Mikva was sitting in the front row of the audience. Someone asked, "Judge Sporkin, you could let jurors take notes, you could let jurors ask questions, you could do all of these things. You have tremendous freedom as a federal judge to do these things. Why don't you?"[1]

Judge Sporkin replied, "I am a coward." He then pointed to Judge Abner Mikva and said, "Besides, Ab would overturn me." Now that was not, strictly speaking, accurate, because it was at that very time that Judge Sporkin was presiding over a case in which a variety of very high-technology, innovative techniques were being used to present a complicated case to the jury. Following a very innovative laser disc presentation of a closing argument, opposing counsel stood up to make its closing argument and in an effort to regain the momentum said, "Well, Judge Sporkin, I am going to present my argument in the old-fashioned way, with paper and voice." Judge Sporkin said, "Don't knock the new way. I am telling you it is sensational."[2]

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1. *See Selecting Impartial Juries; Must Ignorance Be a Virtue in Our Search for Justice?, Panel Two: Current Judical Practice, Legal Issues, and Existing Remedies, The Annenberg Washington Program Conference, May 11, 1990*, 40 AM. U. L. REV. 573, 594 (1990) (statement of unidentified audience member).

2. Robert F. Seltzer & Mark G. Phillips, *Laser Discs Propel Courts into the Future*, MASS. LAW. WEEKLY, Nov. 11, 1991, at S1.

Well, that is what we are here to talk about during this last panel: what can the new way tell us when the previous options we have discussed for ways of improving communication between judges and juries have failed? Without further ado, I will introduce Ted Ciccone and let him start the panel.

MR. CICCONE: Thank you, Fred. If I could ask you to turn the lights off, please, and dim the overheads.

It gives me great pleasure to be here with you. Today I would like to stimulate your imagination in the use of visual aids and demonstrative evidence.

(A series of slides and a high-technology video were shown.)

From the perspective of being involved in visual communications for more than twenty years, I can tell you that many trial lawyers today still do not take full advantage of the vast array of visual media available to them. Now, some of you might ask, "Why use visual aids and demonstrative evidence? Why not rely on oration alone to convey your story to a jury?" The answer is simply that human beings are visually oriented.

The majority of our learning comes to us through our sight. From childhood, we first begin observing our parents and peers as models of behavior. The enormous amounts of information presented in our education process are absorbed primarily through sight. Our reasoning and imagination are fueled by information gathered with our sense of sight. Advertisers have always known this and fiercely compete for our attention. Consumer buying decisions for major items, such as homes, furniture, and automobiles, to mention a few, are tremendously influenced by visual impact as evidenced by the investment in advertising as well as product design.

Is it any wonder that today visual aids are considered to be the most effective way of communicating abstract or complex technical data? Visual input is a vital portion of the human ability to process and remember facts. Research has shown that the use of visual aids with an oral presentation can aid comprehension, minimize misunderstanding, and increase retention level by as much as sixty-five percent.

As many of you have observed, a witness's oral testimony can be absolutely boring and by this time a juror has stopped paying full attention. It should come as no surprise that as much as ninety percent of verbal testimony is misunderstood or forgotten completely. Visual aids allow you to logically convey your client's story to the jury. You may hone in on pertinent facts relative to your case in ways that will dramatically increase understanding and retention during deliberation—days, weeks, or months later.

As an example of this, today I brought two large scale models of a small computer component called a SIMMS board. These models were used in successful patent litigation that Wang brought against Toshiba and NEC. Well, it was advantageous for us to take these infringing pieces and make exact replicas of them—giant size. The expert witness used them in his testimony. He was able to take them apart, flip them, and actually magnify the issue at hand.

Now let me narrow our focus a bit. I have been asked to speak on video presentations for use in the courtroom. As a result of years documenting history-shaping events, political coverage, news exposés, and even wars, the medium of video now enjoys instant acceptance and attention from almost any audience. Video documentaries are a powerful tool for recreating events, situations, or conditions that no longer exist or would be impossible to relate in any other way. On location or studio shooting combined with computer animation and photomation techniques can effectively reveal the most subtle or minute detail of a sequence of events after which the jury often comes away with a feeling of having a first-hand experience.

(A high-technology video was shown at this point.)

I thank you.

MR. CATE: Thank you. Now, Elizabeth Browning.

MS. BROWNING: Thank you, Fred. I have brought with me a different kind of presentation. Fortunately, one of my daughters lives in Washington, so I pressed her into service. That is one of the privileges of having four children.

I started to entitle this speech "res ipsa loquitur," the thing speaks for itself, which is what we would like to do whenever we present an exhibit. I see my role as both a lawyer and a communications consultant. When I was in law school, I was almost contemptuous of the jury situation, saying, "Ha, a jury of my peers, forget it." But juries, I find, work very, very hard to do the right thing. They may not be sophisticated and they may not have a high degree of education, but if you reach out and show them that you are talking about apples and not oranges, they listen very carefully.

So we present a number of exhibits called flat art. We think we appeal to a jury at all levels: subliminal, intellectual, and emotional. I happen to be one of the people who was convinced that all jury decisions are emotional and not rational. That is not very heartening for lawyers who think they are appealing very rationally.

(A series of flat art exhibits was shown.)

We make small copies of the exhibits and produce jury notebooks with color copies for the jury to follow as they go along.

We also do time lines so that you can build the events as they go along. And if you cannot get something into evidence, you do not have to put it up there. You are not stuck with it.

Now, we do not do only flat art, but we find that it is easy. Judges like it. I find that judges are always receptive to what we do. We have never had a hostile judge. They have always loved it. They are concerned about their juries and their understanding.

I have brought along the magical laser disc that every lawyer is dying to know about, but nobody really wants one. The laser disc is the star wars part of the show. You can pick up anything you want to pick up: a sentence, a whole document, part of a deposition, an exhibit. Once it is organized, anything can be accessed at once.

(A series of still and animated laser disc images was shown.)

But, and there is a but, once the disc is finished, it cannot be changed or amended. It is literally cast in bronze or in plastic. So it is a wonderful tool for masses of material that you know you will need and have the luxury to prepare in advance. Most, if not all of my clients, however, make frequent last minute changes and additions during trial, and for that you need a different and more flexible medium. So the laser disc is not the one answer, but it is certainly an answer.

I have here a sheet of bar codes and a little reader with a pen that are used to call up different images from the laser disc. With the laser disc, you can exhibit a model, a picture of a model, a still model, and photographs. You can put in a segment of a deposition, any segment you want. You can also produce animated images. Whether you would do this or not in the courtroom depends upon your style as a lawyer. As I said, if you have 500 documents, it is a wonderful tool.

There was a piece in the *New York Times* a couple of months ago about a patent trial in New Jersey where both sides had everything on laser disc. Many utilities are putting their entire nuclear plant, every ten feet, on laser disc and sending it to the Nuclear Regulatory Commission. If the Commission has a problem or a question about a part of the nuclear plant, they get out the laser disc and access that very part of it. So there are many fascinating things that can be done with the disc. The other side is that it has to be done in advance, and once it is done, it cannot be changed.

That concludes what I have brought with me today. Thank you.

MR. CATE: Thank you. Mr. Ruyak, you use these innovative techniques. Which types of these advanced technologies have you used in the courtroom and how?

MR. RUYAK: I have worked with Ted Ciccone primarily, and many of the things you saw on the film we have used. At a trial last August in Virginia, we used the giant models of the SIMMS boards Ted Ciccone mentioned in his presentation. I think the important point is that you use what is necessary in a particular case, with a particular court, and with a particular jury. I will give you an example.

In Virginia, we have what is known as the "rocket docket." A case filed normally goes to trial in six to nine months. And if you have a complex case, such as a patent case, and if you are the plaintiff, as I was in that case, you have to understand that most juries, if simply given oral testimony and instructions and lawyers' descriptions, may take two or three weeks to figure out the background, the genre they are working in, and what they need to apply the facts to. By that time, it is too late because the trial is over.

My concept is that up front you have to explain all of the mechanical devices, the jargon, and the characters in the litigation. You do this by taking a novel and reducing it to a screen play—a 500-page novel to a two-hour screen play.

It really does fall on the lawyers, in my view, to present their case. Too often I have seen lawyers who have terrific legal minds, who have all of the attributes of good pretrial preparation and articulate oral argument, but who are utterly unimpressive when presenting their case to a jury. They seem to forget that a trial is the conclusion they may have to reach. Maybe that is because, as was said, so few cases go to trial. I think the important thing is that judges have certain concerns about the use of technology in their courtrooms, so you have to lay the foundation long before the trial and long before the final pretrial hearing to determine whether a judge will permit the types of technology that you want to use.

As a practical matter, I have found very little resistance to the types of films, models, blow-ups, and exhibits that we have seen here today, so long as the judge understands what you are doing with those exhibits, their importance to the particular case, and so long as the other side has a fair opportunity to also see what you are intending to present to the jury.

There is an old statement that you are "writing on a clean slate" with the jury, but that is not true. You are not writing on a clean slate. That is part of the problem in most cases. Jurors come with preconceptions. They come with some experience. But those conceptions and experiences might be very different from the factual circumstance that you are presenting. Therefore, you have to overcome that and teach up front. You have to set the stage.

Quite frankly, the only way I have found to do that is to take the mechanical devices and technical jargon that you have been using for years in preparing a case, and present it in an understandable form to the jury up front. Films are a tremendous way to do that. You can show the mechanical devices without going out into the field, without bringing them into the courtroom in their full size or complexity, and get the jurors to understand what they need to know as the facts, the circumstances, and the testimony comes in.

It is sort of like golf. You have to play the ball where it lays, particularly with witnesses. You may be very fortunate in a case to have a very dynamic and charismatic witness that can keep the jury alive and following what she is saying. Nine times out of ten, however, that is not the case. As a result you could have a witness who is frightened, intimidated, very low key, and afraid to speak up. By using models and graphic charts, you can bring the full import of that witness's testimony before the jury. They can keep up with it, they can understand it, and they can view it in a logical progression.

One of the things that came up today was the fact that some studies show that judges and juries come to the same conclusion eighty percent of the time. The problem, as I look at it, is: what is that conclusion? I think the proposition is probably true because judges are so busy today that they do not have much more of an understanding of the facts when a trial starts than the jury. They may have some knowledge, depending on the complexity of the case and the issues raised during pretrial. But in terms of the specific facts, such as seeing the mechanical devices, for example, those that we are looking at here, the judge may not be much further along than the jury.

The point, in my mind, is whether the decision of the jury is an informed one. That is what I am concerned about as a trial lawyer. Are they informed and have I done the informing? Have I presented my case in the best way that I possibly can for my client so that I know, win or lose, that, in fact, the jury understood my client's case? I find that with many of the procedures that courts now employ to bring cases to trial more quickly, it is very important for a lawyer to have and use the technology that is available to get his points across.

MR. CATE: Judge Parker, you have handled some of the most complex litigation we have seen in this country. What role do these technologies play in your courtroom?

JUDGE PARKER: Well, first of all, as far as the jury system is concerned with complex litigation, or any litigation for that matter, I think that the peculiar form of citizen participation in government that we have had for so long has had a soothing effect on the national psyche. I think our citizens are so much more willing to accept adverse judgments from their fellow citizens than they are from bureaucrats or people like me. We need to preserve the

jury system. But we have to make it workable. We have to enhance juror comprehension, and it is possible. It is done frequently. If we do not, formal dispute resolution as we know it today will become even less relevant than it is today.

I am a fan of laser disc technology. It is a marvelous way to present information to a jury. Computer generated imagery is a wonderful tool to use in the course of a trial for document retrieval and document storage. But all of these techniques are a bit empty without some other techniques in the management of a trial.

I get depressed when I come to meetings like this of people who are experienced and highly intelligent talking about things as "innovative" that have been around for a long time and are used frequently. If lawyers are permitted to use this technology in a proper context that is designed to enhance jury comprehension from the start to the finish, the final product you get out of that jury is so much better.

Let me just run through a few. The jury should have the instructions at the very start of the case. They should know exactly what the case is about, what each side has to prove. If the trial is going to be lengthy at all, you should give them a notebook, and those instructions should be in the notebook. They should know from the start the questions they are going to have to answer at the end. You may make rulings during the course of the trial to change some of that. You can say, "Okay, tear out page thirteen, here is a new page thirteen." Then you explain it to them.

When you get to the end you should not even have final instructions in cases like this. They should have been instructed from the start. They should know exactly what the rules are. Lawyers should be permitted to talk to the jury at any time and say, "Turn to page twelve in your notebook. You see your instruction here? Now, what you just heard from that witness bears on that in this way."

Use this technology, throw something up on the screen, remind them of the court's instruction, remind them of what a witness is, and point out how it affects what they have to decide. And do all that throughout the trial. In other words, enhance their comprehension, make things fall into place so they can understand it and give you a better final product.

You should be able to tell the jury why you are calling a witness, what the significance of a question or an answer they have just heard is, and why the other lawyers are doing whatever they are doing.

Another tool that is extremely useful, coupled with this technology, is written argument. When you get to the end of the trial—I have tried cases with a half-million documents—invariably it boils down to twenty or thirty documents to each side that really make a difference. And so you permit the

lawyers to put those in a notebook and have their argument opposite each document as to why they think it is important and why it fits in the scheme of things. If the judge cannot explain the difference between evidence and argument to a jury, he should not be on the bench.

We have a great weakness: juror retrieval of evidence and information during the deliberation process. Absent that, they at least ought to have, as part of their notebook, photographs of each witness as that witness appeared on the stand in a lengthy trial. Then when they look at their notes, which say that so and so testified on April 13, they can see a photograph of that witness—and they tell me that when they look at photographs, it brings to life their memory.

But what they ought to have is the trial recorded on laser disc so that the jurors can bring up the testimony of any witness at any point, rehear or see the instructions from the judge, anything that was on the screen, bring it back up in the jury room. That is a great weakness that we have not made progress in.

But these other things are old hat, and they work. Formal dispute resolution is far behind the business community, and it is far behind other forms of government. We look at these things as great innovations, but they were doing it twenty years ago, or much of it, because it works and because it is an effective way to present information.

To those of you who are interested in some of these things, I recommend an article in 11 *Review of Litigation* 203 (1992).[3]

MR. CATE: Judge Parker, what about the concern for bias or the manipulation of this technological evidence? Is it more likely to be used in a way that may confuse the jury or may unfairly present one side's case?

JUDGE PARKER: I do not think that that is a problem, but I will tell you what the real problem is. It is where you have an economic disparity between the parties—where one side can overwhelm the other. You have to keep that playing field level. Ideally, you have corporate giants on each side and money is no object; they can spend however much they want. But many times that is not the case and you do have to make some adjustments in that respect.

MR. CATE: What about the cost? Mr. Ciccone, you showed us a variety of demonstrations. Can you give us some idea of their cost?

MR. CICCONE: When we work with our clients, cost is a big factor, obviously, because litigation is so expensive. We approach it from the standpoint of determining what the best medium is for that particular case, for

3. Advisory Group of the United States District Court for the Southern District of Texas, *Report and Plan Civil Justice Reform Act Advisory Group of the United States District Court for the Southern District of Texas*, 11 REV. LITIG. 203 (1992).

that particular client, and for his budget. I have shown you some various techniques: video techniques, three-dimensional animation, and two-dimensional animation. There were some still images, if you noticed, where we incorporated photomation techniques.

The top of the line is 3-D animation. Less expensive would be 2-D animation. Below that would be painted illustration with photomation techniques. Three-dimensional animation starts at about $1,000 a finished second and goes up to $5,000 a finished second, depending on the techniques or the technicalities involved.

The motion picture that we did for Wang was in thirty-five millimeter film. We felt that it was the best medium. We incorporated three-dimensional animation into the film, and then we converted it to video. That in itself was a documentary; documentaries can start off at $5,000 and go all the way up to $300,000 or $400,000, again, depending on the level of involvement.

MR. CATE: A new concept even for lawyers, billing by the second. Ms. Browning, do you have any idea about the cost difference between the boards as opposed to laser disc? I assume there must be a phenomenal disparity.

MS. BROWNING: The boards, the flat art, are less expensive. There is no question about it—a lot less expensive. It depends on the size of the case, and it depends on the amount in controversy. Both Ted and I have worked on cases where money was no object, but we just did a case for a lawyer whose client had had an embezzler, so he could only spend about $1,500. For $1,500, we did what he needed. We find that the computer is a great saver of money, particularly for small clients, in that you can whip something out on the computer, and it works very well. We print it out, blow it up, and it is great. We have another case now where we are doing 3-D animation, but there is $100 million involved in that case.

We want to do what needs to be done to get your client's message across. If it is five flat exhibits, wonderful. If it is one, great. The case we are working on right now is the only case I have ever had come in the door where I have said that we have to have animation, that there is no other way to understand this. Indeed, it can be as costly as you want it to be, or you can certainly turn out something that is effective and workable for a lot less money.

MR. CATE: Mr. Ruyak, do you ever find that the use of these exhibits gets in the way in the courtroom? We have all seen counsel looking for a piece of paper or a specific place in a deposition. What about when you cannot find a specific place on the laser disc or you cannot find the exact exhibit that you need? Is that a problem?

MR. RUYAK: I guess it can be. Again, I think it comes to preparation. You have to practice; you have to work out techniques to compensate for that. You

have to be tough with yourself because you cannot have a misfire in the courtroom in front of the jury. I think a lot of the things we are talking about, in terms of communicating with the jury, come down to the lawyer, because the lawyer can make up for a lot of problems that exist in a case, including the problem of complex jury instructions.

A lawyer can make up for that by using a variety of these techniques, but she can also compound the problem if the techniques do not work. I think it is a discipline issue, basically you have to have a back up. Normally, we do have a back up for everything that we use on film or laser disc in the courtroom. We have to have a back-up method of getting that point across if, in fact, the technology does not work, which sometimes can happen; or if it is just not effective, which can also happen.

Of course, in a major case where you have greater resources you can test almost everything, even on a phantom jury, if you want, or some people in your law firm. You can test it to see if it works. In a more limited case, you cannot, so you have to have a back-up system of getting such points across.

MR. CATE: Let me open this up for comments or questions from the audience. Judge Cordell.

AUDIENCE MEMBER (Judge LaDoris Cordell): One of my primary concerns is access to the courts and seeing that people, the have-nots, have as much access to getting as fair of a trial as they can. Given the costs involved—I do not in any way dispute how effective all of these graphic displays can be—do you do pro bono work? Do you make yourselves available to the have-nots? And if you do, great. If not, why not?

MR. RUYAK: I can express that as a law firm, we have a certain percentage of pro bono work by agreement among the partners. We treat those cases as we treat other cases. I know that Ted has done some work for us on pro bono cases. But many of our pro bono cases are not complicated enough to require these techniques.

A few years ago, however, we handled a criminal case for Mayor Barry's former wife. That was a long, involved trial of embezzlement. It took about twelve months' work, and the trial itself lasted a couple of months. We used many of the techniques you see here to try to get the points across to the jury for the defense.

I would venture to say that I have used most of these techniques in two types of cases. One is in patent cases, where generally the case involves two corporations fighting over the validity or infringement of a patent. Both sides use them; some better than others. The other area is in larger antitrust cases.

I think that it is also true that the cost may be prohibitive for certain parties, which is, and has been, a problem. I think that is where the judge, as

Judge Parker said, has to step in and make a level playing field. The judge cannot permit one side to totally overwhelm the other side with technology.

MS. BROWNING: Judge Cordell, I too would like to address that point briefly. I feel very strongly that my firm needs to contribute to the community because we have been so fortunate. I would be more than happy to do exhibits pro bono for my clients who do pro bono work. The other thing we do is free exhibits for the moot court teams at two law schools that we have in Houston. This has been fun because they cannot afford it, and they have had some stunning successes. I would be more than happy to do more pro bono. I am rarely asked.

JUDGE PARKER: Let me mention one other thing. Those of you who are thinking about doing studies concerning nonverbal communication, I would invite you to. I think you have a wealth of information available from trials that are recorded on videotape in Kentucky, Oregon, and in the state court systems. There may be some others. We approved voice activated video recording for the federal court system in Philadelphia, San Antonio, and New Orleans. The problem we are having is that the courts of appeals refuse to look at the tapes. Because they will only read a transcript, we are not getting a decent test. But the trials are recorded on tape in their entirety, including the judge and the witnesses. This is available to those of you who are studying nonverbal communication.

MR. CATE: Let us take just one more question.

AUDIENCE MEMBER: Judge Parker, you refer to a jury notebook. I have not seen one of those. I would be interested to hear you describe that.

JUDGE PARKER: A jury notebook has places for the jurors to take notes. It has court instructions, written arguments from the lawyers, copies of exhibits, and whatever else you want to put in there.

MR. CICCONE: I might add that on a regular basis, when we do our large flat exhibits, we also provide a notebook-sized handout for the jury, if, indeed, the judge will allow them to have it. It is usually in color as well.

MR. CATE: Thank you, Ted, and my thanks to each of you for having participated today.