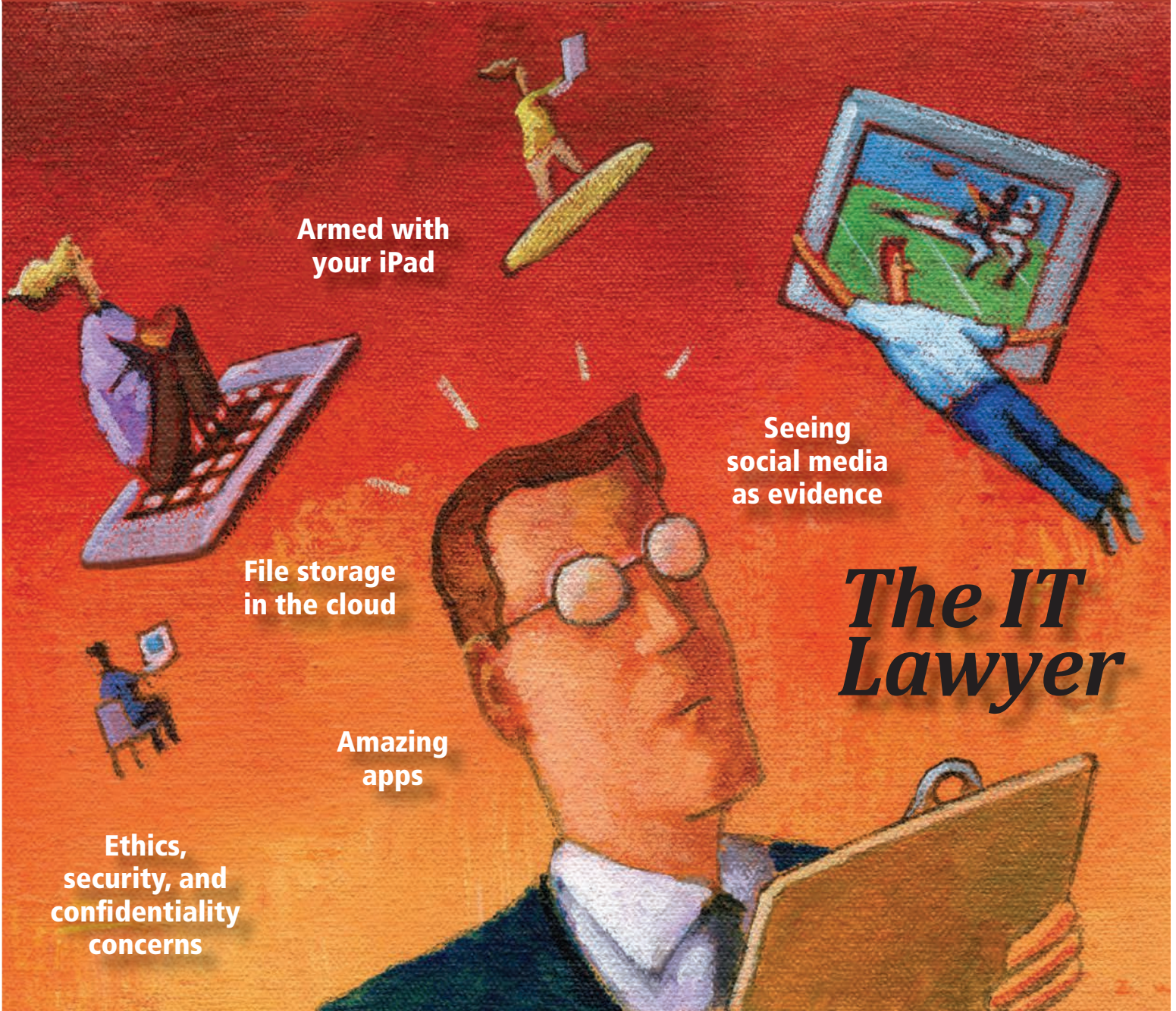


ABA SECTION OF FAMILY LAW

FAMILY ADVOCATE

Spring 2015 • Vol. 37, No. 4



Armed with
your iPad

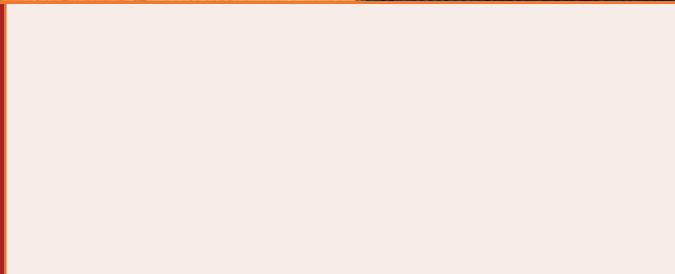
Seeing
social media
as evidence

File storage
in the cloud

Amazing
apps

Ethics,
security, and
confidentiality
concerns

The IT Lawyer



AMERICAN BAR ASSOCIATION

By JONATHAN W. LOUNSBERRY

USING TECHNOLOGY

INSIDE & OUTSIDE

THE COURTROOM

.....
**STREAMLINING THE LITIGATION PROCESS AND
ENHANCING THE IMPACT OF EVIDENCE**
.....

My introduction to family court litigation occurred during my junior year in college. That fall, I took a job as a file clerk and runner with McLaren & Lee (Columbia, S.C.), a small firm specializing in family court litigation. On my first day at work, I noticed a certain gleam in the eyes of paralegals and attorneys when they realized I drove an SUV. Their delight over the size of my car left me at a loss. Without further thought on the subject, I spent the rest of my first week helping to prepare for a

week-long trial. When I arrived at the office the following Monday morning, I understood why my car attracted such attention. Without it, I could not have taken the 20-plus bankers boxes to the courthouse in a single trip. Right then and there, I learned how document intensive the practice of family court litigation could be.

In 2011, I returned to work at McLaren & Lee. One year prior to my return, release of the first-generation iPad caused a sea change in trial presentation and document



management. As a result, we learned how to leverage technology: making volumes of documents manageable, having information ready-to-hand, and removing the need for large vehicles. The more we integrated and leveraged technology, the less paper exhibits and bankers boxes we needed for deposition or trial. Oral arguments and presentations of evidence became crisp and clear. Transcripts became less cumbersome to review and summarize. The integration of technology did not change the way the firm practiced, it changed the way information was digested, distributed, and presented.

Following is what I have learned about integrating technology into a family law practice and how it can streamline the litigation process and increase the impact of evidence. My insights are not platform specific. I have used Macs, PCs, and Apple products during all phases of the litigation process. Currently, I work for a firm that uses Macs, iPhones, and iPads. Previously, I worked with a combination of PCs and Apple products. All the programs and apps discussed are available, in some fashion, on both platforms (Mac or PC) or are available only on iOS (e.g., iPad, iPod, or iPhone). Although other tablets and peripherals exist (e.g., Google Nexus, Microsoft Surface, Amazon Fire), I have no hands-on experience of them. However, in an effort to be as platform-agnostic as possible, I will include non-iOS alternatives when I am aware of them.

The apps and workflows I describe can be used regardless of firm size or case complexity. Although using technology can make large, complex matters workable, it is equally advantageous in small, “routine” cases. Being aware of the available resources allows for laser-focused preparation and presentation during all stages of litigation. The uses and workflow of these apps are limited only by your imagination. In addition, the advantage of these apps or workflows do not depend on a larger court system—where technology is readily available. All of these examples can be used irrespective of the available technologies in the courtroom.

.....
THE “WHY”

Technology continues to advance at an exponential rate. This rapid advance permeates our everyday lives. Today, many people prefer to communicate by text message or e-mail. Instead of letters and phone calls, friends and families keep in touch on social media. On the whole, media consumption continues to increase, while attention spans slowly decrease. Attention spans are important because effective communication requires an understanding of learning styles and retention rates.

People learn by hearing (auditory), seeing (visual), doing (kinesthetic), or some combination. Ensuring that the fact-finder retains most of the information presented—if not all of it—should be of paramount concern. The amount

of information retained by the fact-finder depends on the learning style employed. Studies show that a visual presentation has the highest rate of retention, followed by auditory, then kinesthetic. Using technology allows us to aid the fact-finder in leveraging learning styles, thus increasing the amount of information retained. Combining visual and auditory presentations increases retention rates, making “show and tell” just as impressive in the courtroom as it was in primary school. Using oral testimony and visuals together creates strong memory anchors for fact-finders to rely on.

.....
THE “HOW”

It is best to think of these technological aids as today’s butcher-paper pads and foam board. The programs and apps discussed here are not used to create “digital evidence.” Instead, they are your “visual aids” employed to bring certain portions of exhibits to the fact-finder’s attention, just as you would have done with foam board. Using only paper exhibits to elicit facts and testimony is just not as effective or efficient as incorporating technology.

Paper is not being replaced. Clean paper copies of exhibits are still provided to all counsel as official exhibits. As each exhibit is entered into evidence, the electronic version is shown to the attorneys, the fact-finder, and the witnesses. Each electronic version is the exact same as the paper version, even down to the exhibit sticker.



“Go-Bag” Packing List

If you plan on using technology at any point during the litigation process, it is imperative that you have a “go-bag,” containing everything you need to be self-sufficient and independent of local amenities. Following is a sample list of items for a “go-bag.” The items in your bag will depend on the methods of presentation and the technological capabilities available onsite, as well as any other situational needs or concerns. As experience dictates your needs, the contents of your “go-bag” will evolve. For instance, you may be setting up in the courtroom and think: “I could really use a roll of gaffer’s tape.” (True story.)

Use this list below as a template, adding or subtracting based on your needs.

- Extension cords
- Multi-plugs
- Chargers (for all devices)
- Thumb-drives
- Gaffer’s tape
- Adapters for iOS or Android devices
- Quick ties
- Batteries for controllers
- Cleaning wipes
- Wi-Fi hotspots
- VPN access to your office
- Printers
- HDMI cords
- Any necessary tools
- Whatever experience dictates or you need to operate throughout a trial or deposition.

—J. W. L.

Using electronic versions of exhibits gives the lawyer greater control and flexibility. For example, what if only a certain part of an exhibit is admitted? No problem. The programs and apps discussed here allow you to present only those sections. This kind of adaptation creates a fluid examination. There is no waiting for everyone to get to the same section and page of the exhibit because you can direct everyone to it with ease.

Need to present social media evidence? No problem. With electronic versions of exhibits, social media or other Internet-derived evidence can be seen in its native format, making the exhibit more accessible (and therefore more memorable) than it would be on paper. The size or format of an exhibit should not be a barrier to efficient or effective testimony.

In short, evidence can be delivered in clearer, more digestible bites: increasing the impact of witness testimony, saving time, and keeping the fact-finder focused. So, how do you use these tools effectively?

LESS IS MORE

Using technology during the litigation process does not mean it needs to become a full on Hollywood production. Less is more. The best practice is always to follow the K.I.S.S. principle when crafting electronic versions of exhibits. Technology enhanced presentations should be simple: displaying appropriate single points or facts. Diagrams illustrate points better than words. Use a chart or graph to summarize and quantify information instead of a complicated, hard-to-read table. Your goal is to give the fact-finder an easy-to-understand exhibit.

The simpler a demonstrative exhibit is, the more understandable it becomes. Your aim should be detailed brevity. This is not an exercise in showing how smart you are. Rather, it is an attempt to increase the fact-finder's retention of information or an exercise in increasing memory, just as information on paper can be distilled to capture and present effective, salient, and memorable testimony.

Rules of evidence likely allow for the use of such summaries, lessening foundational concerns; but, it is always best to check your local rules of evidence and civil procedure before attempting to use any sort of technology in the courtroom or at a deposition. The Federal Rules of Evidence allow summaries and copies of exhibits to be used as long as the summaries are based on data contained in the documents and the copies are authentic. *See* Rule 901 (Authenticating or Identifying Evidence), FRE; Rule 1003 (Admissibility of Duplicates), FRE; Rule 1006 (Summaries to Prove Content), FRE; and Rule 1007 (Testimony or Statement of a Party to Prove Content), FRE. Remember, you are not creating new electronic exhibits, you are using technology to bring the exhibit to the court's attention.

TEAMWORK AND PRACTICE ARE KEY

As with most everything, teamwork and practice are the keys to success. Whether you are a solo practitioner or work in a firm (large or small), everyone on your team must know how to use every piece of technology you plan to employ. The only way you or anyone else will acquire this knowledge is through practice. Practice. Practice. Practice. The more you practice, the more comfortable you will feel. (You also get the added bonus of being able to refine your argument or presentation.) The more comfortable you are, the greater the chance of increasing the fact-finder's retention of information.

You (or your team) should be able to quickly set up and use your technology of choice without any drama. When you bring technology to court, the fact-finder expects you to know how to use it. If you begin fumbling with cords, apps, devices, etc., while setting up or presenting your case to the court, everyone will stop paying attention to what you are saying and pay attention to what you are doing. Practice will help keep you relaxed and the fact-finder focused on the task at hand.

BE PREPARED

Know the rules and the room. There are courtrooms that do not have Wi-Fi or reliable cell-phone service, and there are courtrooms with every possible bell and whistle. Do you need to bring a screen and projector? Is the court equipped with its own? What kind of plugs and connectors will you need? Do not guess. Take a field trip and see what your courtroom has to offer. Talk with court personnel to see if getting into the courtroom early to set up is possible. The only way to be prepared is to know what you face. As with practice, being prepared will also help you stay relaxed and the fact-finder focused.

Strive to be self-sufficient and independent of any locally provided services. Do not rely on anyone but yourself. Have a "go-bag" that has everything you need to communicate your case in court. (See page 9.)

Being totally self-sufficient, however, will not protect you from things occasionally going awry. Expect the unexpected. Even the most prepared lawyer will occasionally experience Murphy's Law. Things fall apart and are forgotten. Despite your best efforts, one day you will experience a system failure. Do not panic. No matter what, keep moving. Do not stop and try to fix it. Everyone's attention will shift from the testimony or your argument to your dealing with the glitch. It is better to act as if the failure is part of your presentation or there is no problem at all. If you act like nothing is wrong, no one will be the wiser.

Following are some of the ways technology can help you inside and outside the courtroom. You could implement

just one or all of these suggestions. Start with one you like and understand, and then move on from there.

PORTABLE LEGAL LIBRARY

Computers and tablet devices can hold a plethora of legal resources, providing instant access to rules of procedure, rules of evidence, case law, and statutes. Imagine storing hundreds of books in a single, portable device. There are a number of programs that can be used to create a portable legal library. Depending on the program and format used, these resources can be available to you without Wi-Fi or cell-phone service. It is important that anything you use to create your portable law library is fully searchable (title and body of texts) and allows for annotations of the text.

Thompson Reuter's ProView (available on Android, iOS, PCs, and Macs) allows you to access, annotate, and search selected Thompson Reuters eBooks and periodicals. **Evernote** (available on Android, iOS, PCs, and Macs) and **Microsoft OneNote** (available on Android, iOS, PCs, and Macs) allow you to store, tag, and organize various types of electronic media, along with notes. **The Rulebook** app (only available on iOS) provides up-to-date copies of federal and state rules, as well as secondary sources (e.g., *The Bluebook*, *ABA Model Rules of Professional Conduct*). Having instant access to your legal library is invaluable. These are only a few examples of programs that can be used to create a portable legal library, and the program

or app you use will depend on your needs and personal preferences.

I use **Evernote** as my portable legal library, storing case law, articles, and other research. Evernote allows me to collect, organize, tag, and annotate a significant amount of information. No matter where I am, I have access to this information on my computer, iPad, and iPhone. Evernote offers a free service and a premium service. Both are great, but the premium service, among other features, allows all of your notes (regardless of the form, including handwritten notes) to be searchable.

PORTABLE CASE FILE

While having a portable legal library is indispensable, so is being able to take your entire case file with you to court (minus the bankers boxes). If you are scanning your case documents and storing them in PDF format as part of a paperless practice, you are well on your way to accessing your case files on a tablet device. (Note: a robust, consistent file-naming convention is crucial to finding case documents quickly.) All that is left is a way to access your documents remotely. Some case and document management systems have app extensions for Android and iOS. (If you use a cloud-based case or document management system, make sure to review your jurisdiction's ethics rules on storing confidential client information in the cloud.) If the applications are synced, you can have access to your entire

New Release by Trial Consultant Jeffrey P. Wittmann, Ph.D.



Purchase me @
matlaw.com

Evaluating Evaluations: An Attorney's Handbook for Analyzing Child Custody Reports

Seasoned family law attorneys are acutely aware of the enormous impact that forensic custody evaluations can have on the lives of their clients. However, not every client has the financial resources to hire a forensic consultant when a custody report has to be analyzed.

This comprehensive handbook provides a step-by-step system that attorneys can apply to custody reports to discern both their strengths and weakness. Dr. Wittmann presents his **Custody Assessment Analysis System (CAAS)** in an easily understood, readily applied, and fully annotated format that the attorney can put to work immediately in his or her practice.

When used side-by-side with the companion **Custody Assessment Analysis System Workbook** what was once a daunting venture into a morass of psycho-jargon becomes a clear roadmap to astute analysis and, ultimately, to persuasive courtroom presentation.



GROUND
BREAKING
Practice Tool

About the Author

Dr. Wittmann is a licensed psychologist and trial consultant whose national practice focuses on trial support for attorneys in custody and access matters and on peer review of child custody evaluations.

More information is available at
childcustodyforensics.com.



About the Publisher

MatLaw is a valuable professional information resource for the family law bar, providing specialized practice publications, expert-based software systems, and high-quality Continuing Legal Education programs.

Inquiries

MatLaw Systems Corp.
1-800-416-8477
www.matlaw.com

case file—even offline in some instances.

Other apps, like **GoodReader** (available for iOS only), allow you to manage, annotate, and search within the body of PDF files. Using a GoodReader-type app allows for a little more control and manipulation or annotation of your documents than app extensions. The freedom that comes with carrying an entire case file in a tablet computer less than half-an-inch thick is priceless; so is the look on the fact-finder's face when you are able to access case documents and case law without having to search through a collection of bankers boxes.

TECHNOLOGY AND DEPOSITIONS

Having access to information is good, but being able to use it is better. Learning how to use technology in depositions is a game-changer. It allows for greater control, organization of questions and exhibits, and a faster method for creating transcript summaries.

The most effective method I have seen is a combination of multiple iPads and computers, each dedicated to a specific app and purpose. The first iPad contains an outline of questions for examining the witness, the second has

Leveraging Dictation Apps



apps creates limitless possibilities of productivity. (In fact, I used a speech-to-text app to write most of this article.) Below is a sampling of apps for leveraging the powerful features of today's smartphones.

Native Speech-to-Text Feature

(Free): Both Android and iOS offer the ability to create voice-initiated e-mails, SMS messages, and notes. By tapping the "microphone" icon (when available), you can dictate information to the phone, which is then translated into text. (Note: There is a time limit when using this feature, and you may also need to have an Internet connection.)

Practice Tip: If you have the ability to enter time and billing via a smartphone app, you should also be able to use the native speech-to-text feature to dictate your time-and-billing entries.

➤ **Voice Memos (Price varies depending on app):** Voice memo apps are available for both iOS and Android devices. These apps can be used to record client

meetings (Check your jurisdiction's laws regarding such recordings.), memos regarding a case or witness, reminders, or regular dictation for staff to transcribe. The basic built-in or free apps are not as robust as a handheld digital recorder, but are capable in their own right. These memos can generally be shared via e-mail, Bluetooth, or MMS messages.

➤ **Dragon Dictation (Free):** Available on iOS only, this is a speech-to-text app that has a more robust recognition of commands and punctuation than the native speech-to-text feature in iOS. The more you use this app, the more it will recognize your voice. It limits dictation to 60 seconds, but the time limit does not affect the length of your dictated text. Simply dictate your document in a series of 60-second bursts. The dictated text can be sent directly from the app as an e-mail or an SMS message or you can copy the dictated text to the clipboard, pasting it via any app that allows you to paste from the clipboard. The iPad version also allows you to create notes that can be viewed, managed, and

saved directly in the app.

➤ **Dictate+Connect (\$16.99):** Available on both iOS and Android, this app turns your smartphone into a more robust digital recorder, including such features as rewind, overwrite, insert, and voice activation. (The app will pause the recording when you stop speaking and continue recording when you speak again.) Each dictation is limited to 24-hours. This app also allows you to share your recordings via e-mail, download, FTP, WebDav, SFTP, and some cloud-based storage systems (e.g., Dropbox or Box).

➤ **Dictate+Connect Free:** Available on both iOS and Android, this app offers all of the features of the paid-for app (discussed above), but each dictation is limited to 30 seconds, and only five dictations can be stored at a time.

Many other speech-to-text, dictation, and voice memo apps are available for both iOS and Android. This sampling only scratches the surface. Taking advantage of such apps can increase productivity and retention of information.

—J. W. L.

Using dictation and voice memos is not a new technological advancement. But having the ability to do both in a single, always-accessible device is convenient and productive.

Today's smartphones allow for dictation and voice memos. Learning to leverage these features following hearings, trials, mediations, depositions, arbitrations, and client meetings is invaluable. Do you need to remember the demeanor of a witness during a deposition and want to make a voice memo about it while driving back to the office? There's an app for that.

Leaving court after a hearing and need to dictate instructions to your staff or the beginnings of an order? There's an app for that. Using a smartphone's built-in capabilities and available

annotated PDF copies of the exhibits, and the third acts as a vehicle for communication among attorney, client, experts, and co-counsel. This setup helps the attorney keep track of all the moving parts in a deposition, without having to worry about switching from app to app on the same iPad.

Understandably, this setup is not for everyone. It occurred during a large, multifaceted litigation. That does not mean technology is inapplicable to depositions in small, “routine” cases. While this setup may be the most effective I have seen, it does not mean it is the absolute best. The best setup is the one that works for you. As with everything, you will find your own style and method for using technology in depositions.

So how should you use technology in a deposition? I would suggest any way you can, but the easiest way to start is in presenting exhibits. As discussed above, technology can bring focus and control.

A great app for presenting exhibits is **TrialPad** (available on iOS only), which has a number of great features: you can present multiple types of exhibits (*e.g.*, PDF, video, and audio files); you can annotate exhibits live or beforehand using callouts, highlighting, and a redaction tool; and you can share your documents, including the annotations.

The way you practice will not change, but the way you digest, distribute, and present information will

(Note: if you are taking advantage of the portable case file, depending on your method of storage, all case documents can be loaded into TrialPad.) Although you are using TrialPad to present your exhibits electronically, you will still need paper copies for the official exhibits.

Regardless of your setup (large or small), be sure to give yourself plenty of time to get everything set up and working. This gives you an opportunity to relax and focus. Once the deposition starts, you should not be thinking about anything other than the deposition.

After the deposition concludes, technology remains important. I have always been told that in preparing for trial, nothing is more important than deposition summaries. Request each transcript in both paper and electronic form (preferably .txt format). Requesting the transcript in electronic form allows you to use a format that speeds up the summarization process.

I prefer to use **TranscriptPad** (available on iOS only) to summarize transcripts because it allows me to review deposition transcripts hands-free on my iPad, along with providing a powerful search function. Pertinent portions of the transcript can be designated with highlights, flags, or issue codes (which you can create). Reports can be generated based on your summary, particularly helpful

for quickly creating trial designations of the deposition transcript by issue.

TECHNOLOGY AT TRIAL

The use of technology at trial is the culmination of the prior concepts and suggestions. Each step of integrating technology builds to form a clear and detailed-oriented trial presentation. If you have implemented all the prior concepts and suggestions, you now have a sizeable amount of information only a keystroke or gesture away, giving you the ability to handle any issue that may arise. You have a portable legal library and case file. Depositions are summarized, and trial designations created. Exhibits are ready for presentation with TrialPad in clearer, more digestible bites, increasing the impact of witness testimony, saving time, and keeping the fact-finder focused.

Another effective way to present testimony and evidence at trial is a **PowerPoint** (available on PC and Mac) or **Keynote** (available on Mac only) presentation. Using a PowerPoint presentation allows for a more structured examination of a witness or opening/closing argument. Instead of annotating an exhibit live, you will need to prepare your callouts and highlights beforehand. Each slide should be simple—illustrating single points or facts. A printout of the slides is helpful as a guide for you during the examination. But, remember, the PowerPoint is the presentation tool, not the exhibit, so clean paper copies of exhibits from the PowerPoint presentation must be admitted as official exhibits.

At trial, the goal is the same—to keep the fact-finder focused so he or she retains a larger percentage of the witnesses’ testimony. The success of using technology at trial depends on how well you integrate the prior concepts and suggestions.

With any luck, the use of technology inside and outside the courtroom has become a little more accessible. Technology can have a positive impact on your practice. Simply bringing an iPad to court will not benefit your case, but a polished endeavor to integrate technology throughout the life of the litigation will.

Incorporating all or some of these methods will take time, but once done you will notice the effects. Data will be marshaled and leveraged to an extent not previously experienced. The way you practice will not change, but the way you digest, distribute, and present information will. Share your success stories with other lawyers and ask what works best for them. Then refine and practice. **FA**



JONATHAN W. LOUNSBERRY practices family law with The Stevens Firm, P.A. in Spartanburg, South Carolina. The author welcomes your questions, comments, and suggestions at jonathan@scfamilylaw.com.