

Utilizing the Visual Space in Litigation

“Give ‘em the old razzle dazzle – Razzle dazzle ‘em.”

For some attorneys like myself, these tongue-in-cheek lyrics from the 1975 musical *Chicago* may have served as their first glimpse into the world of litigation. In this Broadway production, the cunning lawyer Billy Flynn provides a melodic explanation to his client, who faces murder charges, how critical the art of storytelling is in trial. The takeaway message Mr. Flynn provides is this: if persuasion is an artform, then the delivery of the story is the attorney’s canvas and paint. For Billy Flynn, his talent in orchestrating the spectacle of the courtroom led to the acquittal of defendant and vaudevillian Roxie Hart. For attorneys in the real world, this advice may prove worthwhile to employ within your practice in light of the transition in our profession into a much more screen-centered affair.

Many litigators today rely on videoconferencing platforms to perform nearly all daily tasks in light of the pandemic, from attending court hearings, trials, depositions, meetings with clients, or simply as an alternative to a simple phone call. There are many advantages and disadvantages to utilizing videoconference platforms to accomplish these tasks, and the jury is still out on whether videoconference will remain the default platform to perform certain tasks. In the interim, while videoconference remains the default method for performing many tasks, I would like to share a few ideas that may help improve your practice by taking advantage of the new ways you can utilize visual space.

For example, I want you to think back to the practice of attending hearings before the pandemic. I recall these days (usually Fridays) quite well. I would plan my early morning around beating traffic to get to the crowded courthouse parking lot, if there even was a parking lot (good luck commuting into the King County Courthouse). I would have a small forest worth of paper squeezed into an accordion file folder, nestled close to my coat so the rain did not waterlog the file. After getting through the long security line, I would find the courtroom and plan to sit around through the morning docket until the case was called, which could happen suddenly or after sitting through the longest hearings imaginable. Finally, I would have my case called up for hearing and would proceed to present argument. Everyone has their own technique for presenting argument, but for an in-person hearing, you are often limited to two methods: give an outline of your brief or just get to the main point. Oftentimes, it could feel as through this entire event which you devoted your morning to was less than worthwhile as many motions are decided on the briefing.

Since today’s hearings are largely conducted by videoconference, you can now avoid some of the drudgery described above. However, this is not the only advantage. The visual space that videoconference technology gives participants presents a new set of tools which you simply cannot replicate during an in-person hearing. For instance, one technique I like to employ using videoconferencing tools when beginning my argument during a hearing on a motion for summary judgment is what I like to refer to as “the smoking gun” method. Motions for summary judgment are often filed by defendants in a Hail Mary attempt to avoid trial or to otherwise draw out a preview of a plaintiff’s case with a *Celotex* motion.¹ To ensnare the attention of the audience and to set a theme for my argument, I like to begin by using the share screen function to bring every spectator’s attention to the single, most pivotal exhibit which captures the essence of the dispute of fact between the parties. While summary judgment is not intended to be a trial, in many ways it can feel like a bench trial depending on the court you find yourself in. For this reason, the same techniques used by attorneys in engaging a jury and explaining the case to them can be used when explaining the disputes of fact to the court. Practiced trial attorneys know all too well the importance of having an engaging visual presentation is for a jury. Using the visual space to explain your position on summary judgment can prove to be just as effective.

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For example, I represented a series of clients who were victims of sexual abuse by a bowling coach. My firm brought claims on their behalf against the local, state, and national governing body for the sport of bowling. The national governing body filed a motion to dismiss, arguing that as an out-of-state entity with no ties to the State of Washington, it owed no duty to prevent the abuse by the coach who was merely a volunteer whom the national governing body could not control. In

1. The Supreme Court in *Celotex Corp. v. Catrell* held that a moving party could meet its initial burden on summary judgment simply by showing an absence of evidence in the record to support the essential elements of the nonmoving party’s case. The nonmoving party must essentially then prove the negative by presenting evidence to establish each element of the cause of action in dispute.



beginning my argument, I used “the smoking gun” technique and displayed for the Court an internal memorandum created by the national governing body which discussed how critical it was to develop and enforce a set of codes of conduct for its volunteers, otherwise the organization would be subject to countless lawsuits stemming from child abuse at the hands of volunteers. This document served many purposes: it demonstrated that the defendant had a system of controlling the actions of its volunteers, was aware of the perils of its youth athletic members, and knew that the harm was foreseeable. What truly maximized the utility of this evidence however was the use of the visual medium. There is something so persuasive in seeing the exhibit close-up at the forefront of the court’s attention that cannot be replicated by orally summarizing what the document said. For motions that rest heavily on the evidence, such as summary judgment, this method could prove invaluable.

Another way litigators can maximize the unique benefits that videoconferencing offers is through visual-assisted testimony during depositions. For instance, those practitioners who have taken depositions in motor vehicle accident cases will know how frustrating it can be to have a witness that does not remember the area of the collision or the layout of the traffic lanes. This is where the visual space comes in to shine. One technique which I use with witnesses to great effect in these types of cases is to walk a witness through Google Street View and have them recreate the accident step-by-step. The beauty of Google Street View is that you can make any relevant photo still into an exhibit simply by using screen capture. You can also lock-in a witness into giving their best estimation of where exactly the two or more subject vehicles were at the moment of impact thereby establishing the liability case through visuals. If the case involves a rear-end collision following a lane change, for example, I ask the witness to pinpoint on a Google Street View photograph the placement of their two respective vehicles at the moment of the lane change. I then drop red arrows at the two points and lock-in that testimony. Locking-in testimony in this fashion can give you the foundation you need to have an accident reconstruction expert measure vehicle distance to help make your liability case ironclad.

Just as Billy Flynn explained to Broadway audiences over the years, being cognizant of the visual space and how best to utilize it can prove invaluable for your practice. As the practice continues to evolve with further developments in technology, it behooves us to remember that the best litigators are storytellers at heart and that new technology can assist in crafting that next compelling story.



Andy Ulmer of Pfau Cochran Vertetis Amala

Andy Ulmer was inspired to become a lawyer while working as a technical writer and legal assistant in an immigration law firm. The work required excellent listening skills and the ability to pull together narratives that helped clients tell their stories. Seeing his work have a direct impact on people’s lives was rewarding, an outcome that remains a top priority in his practice today, where he advocates for victims of personal and catastrophic injuries and adult survivors of childhood sex abuse.

From physical harm or death caused by a defective product to the long-term mental and emotional suffering endured by childhood sex abuse victims, Andy is committed to rectifying wrongs. While he recognizes that no one can undo past injuries, he can use the legal system to lighten the burden victims carry. Andy is unafraid to do battle with the entities or individuals that cause injury. He works diligently and aggressively to get vindication for his clients, to the fullest extent that the law allows.

In serious personal injury accidents and product defect cases, Andy has witnessed life-changing outcomes and injustices remedied through legal victories. For adult survivors of childhood sex abuse—many of whom were harmed in state foster or group homes, on sports teams, in schools, or in scouting—he understands that the goal of most victims is to find an acceptable resolution that also brings a sense of closure and a chance for a fresh start. Andy is willing to put in the hard work required to make those cases, even where records are incomplete, hidden, or non-existent. He is determined to hold accountable the responsible organizations, systems, entities, and individuals.

Andy’s capacity for empathy and careful listening, along with his ability to tell compelling stories, are his greatest strengths. He considers it a privilege to give voice to victims denied the opportunity or who have been fearful or too deeply scarred to come forward. In all cases, he is a resourceful, compassionate advocate. The opposition doesn’t deter him.