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Settling On The Double-Edged Sword Of Technology

High-tech presentations in negotiations can prevent costly litigation, but they have their price

by Bernadette Starzee

During the mediation of a \$62 million construction case, attorney Sharon P. Stiller made a PowerPoint presentation to graphically demonstrate to the mediator and her adversary how a system malfunctioned.

"Just explaining why the system didn't work would not have been sufficient," said Stiller, a partner at Abrams Fensterman, a law firm based in Lake Success. "Showing pictorially what went wrong was much more effective" to the tune of convincing the other side to settle for "many millions" of dollars.

Just as the use of technology is growing in the courtroom, attorneys are employing high-tech measures during settlement negotiations and alternative dispute resolutions to facilitate a settlement.

For instance, said attorney Joseph P. Ortego, there's an increased use of computer simulations to reconstruct an accident, which can be a powerful method to convince the opposition that it has a high level of exposure and, therefore, it may be best-served by settling. Based in Jericho, Ortego is a partner who leads the products/class action, trade and industry representation practice group for the national law firm Nixon Peabody.

More attorneys are digitally recording their witnesses and experts, and then presenting the recordings at settlement meetings, to show what the individuals would testify to and how they would come across should the case go to trial, Ortego said. Rather than an oral presentation at the settlement meeting, an attorney may make a digital one, complete with an opening statement and parts of the videotaped depositions of witnesses and experts, to communicate a case's major points and strengths.

"People are more persuaded by visual cues, and just as visual demonstrations are used to promote products or to pitch services, they can be very effective in getting your point across in this setting," said Allan Hyman, a senior partner with the East Meadow-based law firm Certilman Balin Adler & Hyman. A sophisticated presentation

at this stage in the game helps demonstrate that you're serious about prosecuting or defending a case, Hyman added.

Technology can also speed up the negotiation process by allowing attorneys to instantly search for relevant documents to support a claim or refute an adversary's point. "Back in the day, for a contract dispute, you might have 25 or 50 boxes of paper documents back in the office," said **Robert M. Tils, a partner at the Garden City-based law firm Moritt, Hock & Hamroff.** "Rather than adjourning for the day and going back to the office to find something, you can type a few key search terms in your laptop and pull up a document."

Additionally, attorneys sometimes use high-tech presentations to communicate to their own clients the issues and the strengths and weaknesses of a case, Ortego said.

But to use high-tech methods, attorneys pay a price, and it can be a high one. "Technology is unlimited - it's just a matter of what you can afford," Ortego said. "If you're representing a helicopter manufacturer and you're reconstructing a crash to demonstrate the cause was pilot error, you need to hire an engineer who's an expert and a firm to create the animation. It will cost \$25,000 or \$30,000 at a minimum."

According to Hyman, elaborate reconstructions are not used for run-of-the-mill cases, in which a couple hundred thousand dollars are at stake.

While recreating accidents or showing visual images of expert testimony can convince an adversary to settle, there's also the chance it might not. "It can be a double-edged sword," Hyman said. "If the other party won't settle, you have revealed your entire case before you needed to, and your adversary will have a very good idea of what to expect at trial."

After observing your presentation, a skilled adversary may come up with one of his own that is counter to yours. "There's always that risk when you share something

with the other side," Ortego said. "With technology, sometimes you can trick yourself into believing something is true, and if your presentation is flawed, you may be exposing that weakness to the other side, which may embolden them not to settle."

Since the onset of electronic discovery, many cases have been settled because a party chose to forego the expense associated with the extensive electronic searches that would be required.

"In the old days, if you had a wrongful termination case, you would go to the human resources department for the records," Ortego said. "Now you have to look at all the electronic data. If there are multiple versions of relevant memos, you have to produce all versions."

Technical experts must be retained to write programs to gather the data, then the data must be managed and analyzed, so that relevant information can be culled and privileged information or trade secrets protected. "Some cases are not worth defending or prosecuting because of the burden of electronic discovery," Ortego said.

In his field of commercial litigation, **Tils** said there is a vast amount of discovery involving e-mails. "We may have to sort through tens of thousands of pages of e-mails to recreate a business negotiation, to try to find a smoking gun," he said.

Because the amount of information that must be searched and reviewed has exponentially increased, in some ways there is an increased possibility that something will fall through the cracks or that privileged information will accidentally be displayed, **Tils** said.