

Stuart Kane LLP

Streamlining and Managing Litigation – Is Technology Friend or Foe?

"In The Land of Poetry and Fighting, Efficiency rules the throne. I try to live here, so I shave my head because hair is dead and dead is inefficient."
— Cameron Conway, Caged: Memoirs of a Cage-Fighting Poet

Litigators also live in the "Land of Poetry and Fighting." Good litigators constantly search for ways to shed inefficiencies and adopt what streamlines. Few go so far as to shave their heads, but most of us do often wonder: In our quest for optimal efficiency, is technology friend or foe?

Litigation technology provides an important tool for efficiency. Yet one of the most important factors in streamlining business litigation has remained constant since well before the first microchip was soldered onto a circuit board: open lines of honest and candid communication. These days, however, rapidly evolving technology for communicating and other litigation tasks has become more important than ever.

Entering the Octagon of Litigation Technology—Not for the Faint of Heart.

Some of us recall when the BlackBerry revolutionized how we communicate and manage our days. It untethered us from our desks. While the BlackBerry has gone the way of the Betamax, it paved the way for smartphones, the tool litigators cannot live without.

Other litigation technology has proven less user-friendly or efficient than the smartphone, however. Such technology now includes eDiscovery, document databases, trial display software, deposition real-time display, and much more. Legions of vendors inundate us with new "tech" they want us to purchase. But just vetting all the possibilities could be a full-time job.

Worse, inefficient or overly expensive technology can thwart efficiency, creating a sharp disadvantage. Woe to the litigant who puts 500,000 pages of documents into an electronic document repository that cannot be searched quickly, easily, and inexpensively for discovery and trial preparation.

Top GCs Foster Communication and Find the Best Technology Solutions.

Joni Lee Gaudes, vice president and general counsel at ASICS America Corporation, provides some timeless words of advice. "Forge relationships with the businesspeople." She has found that early settlement (and avoiding litigation in the first place) can depend on listening and asking a lot of questions— not just of the executives, but also the sales force and others within the company. Since ASICS America is a subsidiary of a Japanese parent company, ASICS Corporation, Gaudes fosters open communication with businesspeople in Japan through monthly videoconferences. They use Google Hangout, although other such platforms abound.

David Harshman, vice president of Legal and Administration, general counsel, and secretary at Toshiba America Information Systems, Inc., also weighs in. He notes how the proliferation of electronic communications (aided and abetted by the smartphone) has companies and counsel searching for the best document-management and eDiscovery platforms. In fact, Toshiba actually built a custom database for managing patent discovery information.

Harshman echoes Gaudes' sage advice about open lines of communication between the legal team and business people. "I have an open-door policy for the business people," Harshman notes. "I have seen other companies where the sales executives and others hide from the legal department. But not here." Despite utilizing the latest (and even custom-built) technology to optimize litigation efficiency, Harshman strongly prefers in-person meetings to foster relationships.

Litigation Technology Options Must be Weighed in Context.

Whether to utilize certain litigation technology often depends on the circumstances. For example, vendors can provide excellent videoconferencing platforms, including hardware, software and service, if needed. In one case, when we recently handled a highly technical, multinational business-litigation case, client executives in Argentina wanted to attend the depositions, but avoid travel time and disruption. Veritext provided videoconferencing for them to attend "virtually." As a result, they contributed invaluable, real-time input during breaks. For relatively little cost, having the client virtually present provided an enormous advantage.

Video also facilitates depositions of out-of-state witnesses. Recently, in a real estate dispute involving development and leasing of retail space, attorneys in San Francisco and Walnut Creek, as well as our attorneys in Newport Beach, simultaneously deposed a witness in Idaho through video-deposition technology. Everyone greatly appreciated the enormous reduction in attorneys' fees and travel costs, not to mention carbon footprint.

Yet in some circumstances, the value of face-to-face cross-examination of a witness cannot be overstated. In those cases, we carefully consider whether the video-deposition is friend or foe. Does the efficiency outweigh the efficacy?

Similarly, telephonic attendance at court appearances can save hours of attorney travel time, conserving those fees for more-important tasks; but it has strong drawbacks. Notably, some judges strongly disfavor CourtCall (the exclusive provider in California). It can be difficult to hear, on both sides of the line (often due to background noise or a poor connection). Also, sometimes attorneys ramble while on the speakerphone, not hearing the ever-more-frustrated judge on the other end of the line trying to cut them off. And some judges just need to look an attorney in the eye. Likewise, appearing telephonically can hamper the attorney's ability to "read the room." We prefer using CourtCall for a routine case management conference (after appearing in person at the first one), rather than for arguing a motion.

Notably, CourtCall is, by statute, a recoverable cost for a prevailing party. Specifically, California Code of Civil Procedure section 367.6(c) provides that telephone appearance fees are recoverable costs under section 1033.5.

"Have Fun!"

In short, maintaining open communication within the company and with outside counsel remains an all-time key principle for streamlining litigation. And technology has become an indispensable tool for facilitating such exchange. Also, with 269 billion emails sent and received each day (according to Statista) and counting, we need strong document management technology. Thus, savvy litigators and in-house counsel stay on the leading edge of rapidly evolving litigation technology, maximizing and managing communications, documents, and other litigation-related tasks.

Successful in-house lawyers agree that open communication, whether virtual or in-person, is the way to build synergy that not only streamlines litigation, but helps avoid it from the start. How to foster such cooperation? According to Harshman: "Create a sense of teamwork. And have fun!"

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