BAN THE BULLET (FROM YOUR SLIDES)

By: Dr. Ken Broda-Bahm

No shortage of discussion lately on gun control, with several states and the federal government considering limits on magazine size, which put a cap on how many bullets can be fired without reloading or changing the clip. But these are actually not the bullets I’m writing about today. Instead, my focus is on something less deadly in the literal sense, but more deadly to chances of good visual communication: bullet points in your PowerPoint presentation. Using bullets can seem like a simple way to walk the audience through your argument, but it isn’t, and the approach actually impedes understanding. Despite this, walk into most courtrooms, mock trial presentation rooms, or CLEs and you’ll see presenters who keep using bullets like they’ve got an unlimited magazine.

One reason for this might be that the message hasn’t fully gotten out yet. Another reason, though, might be that bullets are simply easy for the speaker (both at the preparation and presentation stages) and the lure of having one’s own speaking notes on the screen can lead presenters to put their own needs ahead of their audience’s. Drawing on a study I’ve only recently discovered (Ackerman, 2009), I want to try to put a little more detail behind the central argument for presenters simply banning the bullet as a visual presentation tool and ceasing a reliance on text as the major part of what is shown on screen.

Cognitive Load and Overload
Understanding that many litigators have a longstanding practice of using text-based slides in trial, there are nonetheless good reasons to believe that this is more of a convenience to the speaker than it is an asset to the audience. There is now a sizable and growing body of research focusing on how listeners

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Greetings! I hope you were able to join us for the TIPS Spring Meeting in Washington, DC. It was a great meeting, highlighted by quality CLE programs, an excellent Gala at the Library of Congress, among other great events. I want to shed some light on the internal workings of the TIPS Section and the Trial Techniques Committee. During our training for Chairs, Chair-Elects, and Chair-Elect-Designees, we discussed efforts to increase diversity -- male/female, plaintiff/defense, corporate/outside counsel, racial diversity, and the like. As we were having our discussions, we realized that not only is our current Chair female, but so are our Chair-Elect, Erika Anderson, and Chair-Elect-Designee, Amy Hurwitz. We give credit to our predecessors for welcoming us into the Trial Techniques Committee, and allowing us to get involved in leadership. Carrying the torch of our predecessors, we encourage all our members to let us know if you would like to get more involved. We will find an area that suits your interests.

Our next meeting is at the ABA Annual Meeting in San Francisco, California, August 8-12, 2013. Our business meeting is on Friday, August 9, from 2:30-3:30 PM. Additionally, we will present a program on Saturday, August 10, from 2:00-3:30 PM, co-sponsored by the Plaintiff’s Policy Task Force and Ethics and Professionalism Standing Committee. The Program is entitled “Civility in the Courtroom: Then (1933) and Now (2013),” and focuses on how ethics and civility in the courtroom and practice of law have changed, or not, over the 80 year history of TIPS. The program looks back to the past, and examines whether and how ethics and the profession have changed over the years. We have a great panel of speakers: Associate Justice Wilhelmina M. Wright of the Minnesota Supreme Court; Carol M. Langford, a law professor and practitioner with the Law Offices of Carol M. Langford; Denis Rice, with Arnold & Porter in San Francisco; and Donald J. Winder, with Winder & Counsel, PC, in Salt Lake City, Utah.

I hope to see you all at the Annual meeting! 

Elizabeth Shirley, Burr & Forman, LLP
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I am pleased to bring you the Trial Techniques Committee Spring Newsletter, which contains three fascinating and practical articles relevant to any legal practice.

In our first article, litigation consultant Dr. Ken Broda-Bahm debunks the myth that effective visual presentations require bullet points. Citing various research data, Dr. Broda-Bahm explains how jurors actually retain less information when reviewing bulleted lists, despite our best efforts to simplify information in that way.

Our second article discusses the psychological concept of “emotional intelligence,” and how it might apply to us lawyer-types. Mark Etan looks at some fairly common lawyerly characteristics and ways in which EI can benefit our personal and professional lives.

Finally, what happens when your video deposition won’t play or the monitors in the courtroom go dark? Ben Coulter explores potential technological pitfalls that can occur at trial and the serious repercussions they can have with both judge and jury, and offers some practical advice for avoiding these mishaps.

I must thank these authors for their valuable contributions to this issue of our newsletter. I am certain they have generated a lot of interest among our members. As always, I welcome you, or anyone you know who may be interested, to submit an article for publication in one of our upcoming issues.

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EMOTIONAL INTELLIGENCE MATTERS

By: Etan Mark, J.D.\(^1\)

In 2011, a sitting Justice of the Wisconsin Supreme Court wrapped his hands around a fellow Justice’s neck after a profanity-laced diatribe in the heat of a disagreement. His defense: “it was a total reflex.” Practicing attorneys routinely witness similarly emotionally erratic behavior from colleagues, opposing counsel and occasionally even judges. For the most part, lawyers are smart – high IQs, good test-takers, solid analytical skills. Unfortunately, law school and the popular depiction of attorneys, seems to alternate between glorifying emotional detachment (cold, critical, analysis) and romanticizing emotional volatility (You want the truth?! You can’t handle the truth!). And although corporate America has embraced the importance of emotional intelligence for about 20 years, the legal profession for the most part has lagged in recognizing that emotional intelligence is likely a far more predictive indicator of success in the legal profession than a high IQ.

So what is emotional intelligence? It’s basically emotion management; both your emotions and the emotions of others (in our case, judges, clients and other attorneys). Daniel Goleman, who first popularized EI as a set of skills that drives leadership performance, breaks EI into five components: (i) self-awareness (understanding your own strengths and weaknesses); (ii) self-regulation (controlling impulses); (iii) social skill (managing relationships); (iv) empathy (considering the emotions of others); and (v) motivation (desire to achieve for the sake of achievement).

Not surprisingly, highly emotionally intelligent people whose jobs are complex out-perform their emotionally less-intelligent peers by many orders of magnitude. This is borne out by the reality that clients hire attorneys based on attributes such as “ability to understand business needs and objectives;” “trusted advisor and not just a legal technician;” and “effective communicator.” Look at the rainmakers in your law firm – no doubt the vast majority would ace an emotional intelligence test. It’s not so hard to find a really smart lawyer. But our prospective clients are consistently on the lookout for a lawyer that has the “intangibles;” a much harder attribute to find on Google.

As it turns out, emotional intelligence doesn’t only help with client relationships – it helps with colleagues too. Emotionally toxic workplaces (I’ve heard) are unpleasant. In his book *The Five Dysfunctions of a Team*, Patrick Lencioni opined that five triggers, each of which happen sequentially, will destroy a team. First, people do not trust their teammates and are working in a “defensive” posture. This next leads to a fear of conflict in which people (even litigators) refuse to engage in productive debate. Third, in avoiding conflict, there is no “buy-in” because people do not commit to the final decisions. In turn, there is a decrease in accountability because there is an absence of ownership over tasks. And finally, the results suffer. The collective goals of the team which theoretically should be aligned with client goals are lost, and results are not achieved. It is no coincidence that the attributes of someone with high emotional intelligence – constructive communication, empathy, self-awareness – are inconsistent with the attributes of a dysfunctional team.

I recently had the privilege of meeting Chade-Meng Tan, a Google engineer who wrote a book this year called *Search Inside Yourself: The Unexpected Path to Achieving Success, Happiness (and World Peace)*. The purpose of the book is, as the title connotes, to achieve world peace. To do that, Meng (whose title at Google is – seriously – Jolly Good Fellow (Which Nobody Can Deny)) tells a story: Once upon a time in ancient China, a man on a horse rode past a man standing on the side of the road. The standing man asked “Rider, where are you going?” The man on the horse answered, “I don’t know. Ask the horse.” Our emotions, Meng relates, is the horse. We tend to go where they tell us to. Regulating your emotions and being able to decipher the emotions of others is not just good for business; it helps promote world peace.

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Technical difficulties rank with death and taxes among the inevitable. But how concerned should a lawyer be if she experiences problems with the technology that she plans to use in trial? The basic answer appears to be that repeated technical difficulties risk legal discipline from the trial court and can weaken the persuasive power of the lawyers’ message even if a trial court is willing to give a lawyer broad latitude in working through technical problems. For those reasons, trial lawyers should take every possible step to avoid technical foul ups at a trial.

How are technical difficulties handled by the courts?

Perhaps the most serious concern a litigator might have is that technical difficulties will put their client in a worse legal position and result in discipline from the court. While fears of sanction or legal punishment appear unfounded, there is the danger that a trial court would limit the evidence that can be presented.

The biggest danger with technical hiccups is that difficulties will cause the court to grow impatient and to require that the trial move forward without the benefit of a lawyer’s technological tool or the evidence that it holds. As one judge was famously quoted, “[t]he first time you have trouble with technology, I will grant you a short recess. The second time, I will warn you sternly that it better be fixed, but I’ll still grant you a short recess. The third time it fails, I am going to advise you that we are done with technology for the day and it’s time to move on.”

This, of course, is a serious problem if a litigator has not prepared a backup plan. If the lawyer plans to rely on technology to aid in a presentation, but fails do what is necessary to ensure that the plan can be carried out smoothly, there is a danger that the technology will malfunction, leaving the lawyer without a suitable visual aid, much to his client’s detriment.

Appellate courts have appeared to be relatively consistent in finding that the decision to go forward without certain evidence or demonstratives after encountering technical problems is within the trial court’s discretion. There are, however, limits on a court’s discretion. It can be an abuse of discretion in some instances for a court to limit the evidentiary options open to a litigant based on technical difficulties. In one example, the Supreme Court of Colorado found that it was an abuse of discretion to deny a second preliminary hearing in a criminal case when the transcript of the first hearing was unavailable. Similarly, in reversing and remanding a verdict for the defendant, one court held:

The jury should be able to decide such an important issue based upon the actual testimony at trial rather than being forced to speculate about it. As a result, we conclude that the trial court abused its discretion in not rereading the expert’s testimony to the jury....Nor do we think any “technical” difficulties should be allowed to stand in the way of the jury’s search for the truth, particularly since we can place our confidence in the ingenuity of the trial courts and counsel of this Commonwealth in overcoming repeated technical hiccups can weaken the persuasive power of your message.

NOT THE END OF THE WORLD, BUT BAD ENOUGH: WHAT HAPPENS IF YOU HAVE TECHNICAL PROBLEMS AT TRIAL?

By: Ben Coulter

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3  See, e.g., Allen v. Wine, 297 F. App’x 524, 532 (7th Cir. 2008) (affirming the exclusion of two witnesses after technical difficulties with video conferencing technology and a finding that the witnesses’ testimony would be duplicative of other testimony).

4  Harris v. Dist. Court of City & County of Denver, 843 P.2d 1316, 1320 (Colo. 1992) (“The unavailability of such a transcript due to technical transcription difficulties prevents a defendant from relying on the trial preparation benefits we recognized in those decisions. While additional expense and time will be consumed whenever a second preliminary hearing is required for any reason, the occasions on which such second hearings should be required as the result of technical transcription difficulties will no doubt be relatively few in number....In view of the totality of the circumstances here presented, we conclude that the district court’s denial of the petitioner’s motion for a second preliminary hearing constitutes an abuse of discretion.”).
such problems….we have no difficulty in concluding that the failure to reread the expert’s testimony was prejudicial error requiring a new trial.3

On the other hand, issues with technology are not a “get out of jail free” card, either. Sometimes the decision to proceed without resolving a technical problem is a strategic decision made by a lawyer, and will be viewed as such by the trial court.6

The bottom line is this: while a trial court is unlikely to refuse to allow the presentation of vital evidence on the basis of technical difficulties, there is a very real danger that the trial court might lose patience and prohibit efforts to present testimony on which a lawyer might have been planning to rely heavily. Unless the excluded materials are truly vital, there is a risk that a court’s decision to exclude portions of a presentation or testimony will simply be found to be an exercise of the trial court’s discretion. The danger of serious damage to one’s case is simply too great to be ignored.

How do technical difficulties affect the presentation of a case?

Even if one assumes that one’s problems using technology at trial will not cause direct legal ramifications, there can be serious repercussions for a lawyer attempting to persuade a jury or judge. After all, the most important thing about a visual aid or other technological aid is that it actually aids the speaker’s presentation. There are at least two reasons to be concerned about technical problems at trial.

First, failing to eliminate or severely limit technical difficulties limits a lawyer’s ability to persuade in the courtroom. Studies show that the effective use of visual aids in any kind of public speaking, including speaking at trial, is both expected and impactful. For example, social scientific research in both the legal and non-legal contexts has demonstrated that the effective use of visual aids increases the likelihood that an audience member will remember what the speaker is attempting to communicate. In fact, some studies indicate that people are six times more likely to retain information presented to them with visual aids.7 Assuming that is the case, technical difficulties that are not remedied can provide severe limitations on one’s ability to inform and persuade simply by eliminating an avenue or tool of communication.

There might also be problems even if technological difficulties can be remedied at trial. Researchers studying communication have long believed that it is important to limit distractions and “noise” in communication. One’s ability to persuade can obviously be limited by interference with efforts to communicate, and problems using technology are undoubtedly distracting. Moreover, there may well be a danger of the problem of rising expectations, in which jurors and judges come to believe that a “high tech” presentation is forthcoming, only to be disappointed and let down by a more traditional presentation that would have otherwise been pleasing. Regardless, lawyers should want the triers of fact thinking about the problems in the opposition’s case, not the problems with their attempts to use technology.8

Conclusion

As the use of various types of technology at trial becomes ubiquitous, problems with the use of that technology is, at least to a certain extent, inevitable. Nevertheless, trial lawyers should do everything in their power to eliminate or at least minimize technical problems by practicing ahead of time with the technology they intend to use, contacting courts in advance to familiarize themselves with their courts’ policies and technical capabilities, and preparing to use redundant systems in the case of emergency. Even if technical problems are theoretically unlikely to leave a litigant in a meaningfully weaker legal position, technical problems may prevent a lawyer from communicating as effectively as possible with a judge or jury, which could mean the difference between success and failure at trial.9

8 Part of a juror’s response will of course be impacted by the way that the lawyer experiencing difficulties deals with the situation. The consensus view, and the intuitive view, is that a lawyer should avoid letting a jury see the extent of his or her discomfort when technology fails. See, e.g., Sharon D. Nelson & John W. Simek, Three Strikes and You’re Out: Judges talk about technology in the courtroom, available at www.senseient.com/storage/articles/Three_Strikes.pdf
BAN THE BULLET...  

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simultaneously process and understand visual and verbal information, and the research shows that the common practice of presenting slides with multiple bullets of information actually makes it harder for an audience to understand. The reason is that listeners outstrip their own “cognitive load” (the amount of information and thought an individual can process at any given time) when they’re encouraged to do double-duty using their auditory cortex. Brain research shows that we don’t process written language in the same way that we process a picture using the visual cortex. Instead we essentially ‘talk to ourselves’ as we read and use the auditory cortex – the same region we use when we listen. As a result, the simultaneous presentation of spoken and written speech overtaxes the auditory cortex and outstrips our cognitive load.

More simply, jurors can’t listen and read at the same time, so they choose one or the other, or flip back and forth resulting in lost information. When, on the other hand, the screen is used primarily for visual and not written information, then the listener processes what the attorney is saying with their auditory cortex while processing what is on the screen primarily with their visual cortex.

The Research

The studies back up the advantages of that approach. For example, Dr. Chris Atherton (2009), a cognitive psychologist, conducted a study in which she compared two randomized groups that were each presented with the same information but displayed in distinct styles. One group received what the researcher called the “Traditional” PowerPoint with heavy text descriptions and bullet lists together with the occasional graphic or chart. The second group received what she called a “Sparse Slide” approach, using the same diagrams or graphics, but with only sparse text. Then Dr. Atherton tested the participants’ learning using short essay questions (a method that doesn’t just measure pure recall but taps into the ability to both recall and use the information in a manner that parallels what jurors need to do in deliberation).

Using independent raters who were blind to whether the participant had seen “Traditional” or “Sparse” slides, Dr. Atherton found that those who saw the sparse slides simply got more. They were able to recall and use more themes from the presentations in the subsequent essay. The differences were both statistically significant and quite substantial, with those in the “Sparse Slide” condition remembering and using more than double the themes.

This is just one study in a growing body of cognitive science showing that an audience’s cognitive load is finite, and overtaxing it by using text-heavy presentations just leads to lessened comprehension. What this suggests is that if we want jurors to get, to remember, and to use more of what we present to them, then we should adapt an approach that does not overtax their cognitive loads, but instead allows the visual message they’re seeing to complement the auditory message they’re hearing.

The Simple Solution: Don’t Use Bullets

As we’ve noted before, the best visual approach is to pair a single statement with a simple image. So, the most important practical advice in avoiding bullets is just don’t use them. In addition, it is worth remembering that the problem isn’t bullets per se, but the amount of text they encourage. Once you start writing bullets on slides, it’s easy for them to become a magnet for all key ideas. Once that occurs, you’ve got slides filled with words and an audience torn between reading and listening. So here is the rule:

Unless you are showing or quoting a document, use no bullet points and don’t include more than a sentence or so of text on each slide.

Best Ways to Avoid Bullets in the First Place

Beyond the simple advice of just don’t do it, here are a few best practices for keeping presenters away from that temptation.

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2 For a look at some simple bulletless slides, you can see our examples here, or some more recent examples at the excellent Visual Sugar blog by Bethany Auck at SlideRabbit.
1. Start With What You’re Going to Say

Instead of starting out your presentation preparation by opening PowerPoint and starting in on the slides, start instead by creating your outline and main idea content on paper. Instead of facing a deck of slides and thinking, almost as an afterthought, “What am I going to say during each slide?” it is better to start with the verbal component and then ask, “What visuals would best support my content?”

2. Transfer Your Bullets Into Your Notes Field

If you’re editing a slide deck that already includes bullets, or if it simply helps you to think of your content in bullet points, then the best solution is to move those bullets off the screen and into the “notes” field PowerPoint or Keynote makes available just below the slide in the editing view. If you want to view your notes during the presentation, you can use the “Presenter’s View” so your monitor is showing your notes along with the current and next slide, while the projector is showing only the current slide. This is easy to do using a Mac, and is also possible, with some perseverance, using a PC.

3. Be Creative, and Not Stock, in Your Graphics Selections

Of course the simplest way to create slides without bullets is to pair a bunch of titles with a piece of clip art or a stock photo. In all, that is probably still more effective than using bulleted slides, but it doesn’t take full advantage of your options. The occasional use of a stock image is fine, but repeated use can wear thin. Ultimately, nothing is better than original graphics designed for your specific purpose. But even in the absence of that kind of budget, presenters should stretch themselves: Use a graph instead of numbers, show percentages as pie charts, use figures and case-related photos as much as possible. The closer you are to that, and the further you are from cute clip art and those little ink blot people, the better off you’ll be.

It is understandable that litigators, especially those who have relied on text-based slides for a long time, will feel a bit vulnerable without the security of their bullets. But its important to remember, your ammunition is your arguments, your evidence, and your ability to engage your fact finders visually and persuasively. Your ammunition is not your bullets.


Image Credits. Brain and Data Chart, Nick Bouck, Persuasion Strategies Lead Image: ThreeIfByBike, Flickr Creative Commons

EMOTIONAL INTELLIGENCE… Continued from page 5

Luckily, emotional intelligence can be learned. Meng suggests training emotional intelligence by training attention; and one way to train attention is through meditation. As Viktor Frankl said: “Between stimulus and response, there is a space. In that space lies our freedom and our power to choose our response. In our response lies our growth and our happiness.” The ability to pause before reaction provides us with the necessary opportunity to regulate our “reflex.” Developing empathy among team members also will help a team’s emotional intelligence. Spending 30 Blackberry-free seconds (or more) learning about your colleagues is a good start, particularly if you are acting in a mentorship role.

Applying emotional intelligence to your practice and dedicating yourself to the improvement of emotional intelligence will help you, your firm, and most importantly, your clients. And maybe, while I may not be as optimistic that improved emotional intelligence could lead to world peace, I am almost certain it will help the legal profession.
## 2013-2014 TIPS CALENDAR

### August 2013
8-11 ABA Annual Meeting  
San Francisco Marriott  
Contact: Felisha A. Stewart – 312/988-5672  
San Francisco, CA  
Speaker Contact: Donald Quarles – 312/988-5708

### October 2013
8-13 TIPS Fall Leadership Meeting  
Minneapolis Marriott Hotel  
Contact: Felisha A. Stewart – 312/988-5672  
Minneapolis, MN  
Speaker Contact: Donald Quarles – 312/988-5708

17-18 Aviation Litigation Fall Meeting  
Ritz-Carlton, Washington, DC  
Speaker Contact: Donald Quarles – 312/988-5708

### November 2013
6-8 Fidelity & Surety Committee Fall Meeting  
The Fairmont Copley Plaza  
Boston, MA  
Contact: Donald Quarles – 312/988-5708

### January 2014
21-25 Fidelity & Surety Committee Mid-Winter Meeting  
Waldorf~Astoria Hotel  
New York, NY  
Contact: Felisha A. Stewart – 312/988-5672  
Speaker Contact: Donald Quarles – 312/988-5708

### February 2014
5-11 ABA Midyear Meeting  
Hyatt Regency Chicago  
Chicago, IL  
Contact: Felisha A. Stewart – 312/988-5672  
Speaker Contact: Donald Quarles – 312/988-5708

### April 2014
3-4 Emerging Issues in Motor Vehicle Product Liability Litigation National Program  
Arizona Biltmore Resort & Spa  
Phoenix, AZ  
Contact: Donald Quarles – 312/988-5708