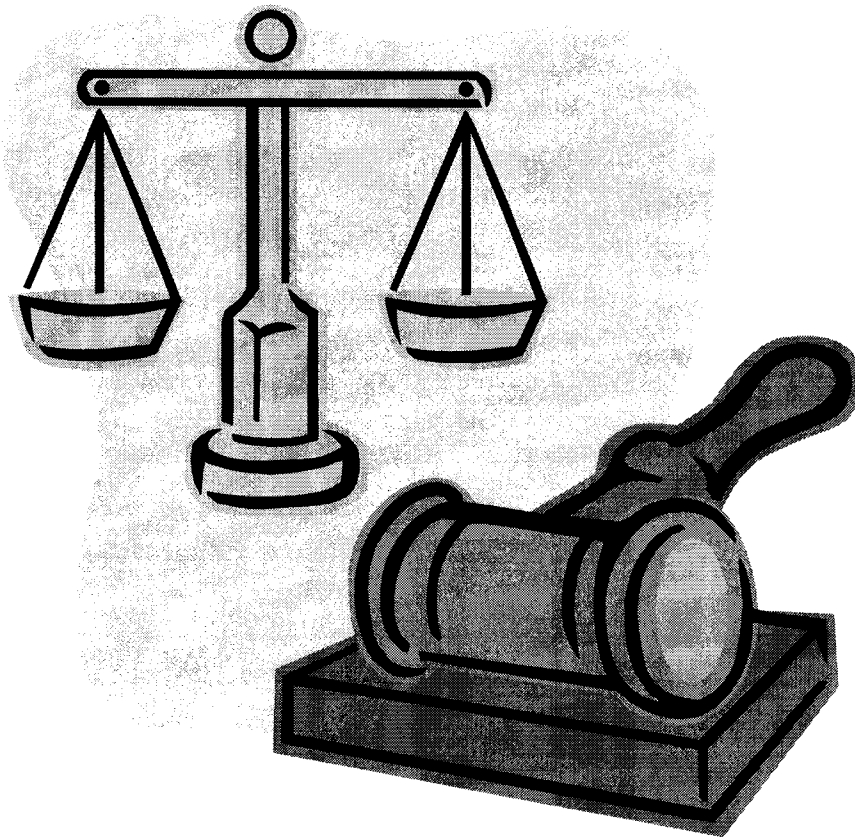


Trial Practice Essentials



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CHAPTER 1

JURY COMMUNICATION AND COMPREHENSION IN THE AGE OF TELEVISION — AND NOW THE INTERNET

Teaching is at the heart of jury trials. Throughout the trial, lawyers must teach people things they probably did not know before entering the courtroom. Whether you are imparting technical data, factual information, or legal concerns, it is imperative to help the jury understand the issues and the facts. But, the process of how adults today take in, digest and remember what is explained has been significantly impacted by their exposure to television. The “contemporary television-trained audience versus the way lawyers present a case in court” is a challenging dichotomy for most litigators.¹ The more successful trial attorneys are successful communicators. The objective of this chapter is to help you become a better communicator by identifying courtroom challenges raised by the reality of how people learn today and to discuss possible communication solutions for trial lawyers.

I. The Effect of Television and the Digital Age

According to Sonya Hamlin in *What Makes Juries Listen*², few people pursue learning new information after leaving school. Generally, “[a]dults tend to stay with what they know and divert themselves from ever really looking at deep basic questions. There is an area of life in which people are continually challenged to learn – the news. Almost certainly, the only new information everyone gets and must continue to process daily is the news. Aware of the mental set of the average American adult, the broadcasting industry has spent considerable time and expense in developing techniques to make people learn, understand and pay attention.

The news is the only new thing most people have to learn, absorb and understand. Whether it’s local, national or international news, the information requires some thought and assimilation, critical appraisal, agreement or disagreement, judgment and decision. “[S]tatistics show that 77 percent of all the people in the country get 90 percent of their news from television and 41 percent get *all* their news from television”³ Hamlin suggests correctly that studying how television reports the news can illuminate what techniques make people learn.

Since Ms. Hamlin’s study in the 1980’s, the advent of the PC, the internet, and a thousand and one digital devices have accelerated and magnified the “television effect” on jurors. This disturbing phenomenon is chronicled in Mark Bauerlein’s provocative book *The Dumbest Generation: How the Digital Age Stupefies Young Americans and Jeopardizes our Future* (2008). Several studies in Bauerlein’s book

compared college students in 2002 with their counterparts in 1982 and 1992. His thesis is aptly summed up in the book's chapter on "Knowledge Deficits." Bauerlein states,

The mental equipment of the young falls short of their media, money, e-gadgets, and career plans. The 18-year-old may have a Visa card, cell phone, My Space page, part-time job, PlayStation 2, and an admissions letter from State U., but ask this wired and on-the-go high school senior a few intellectual questions and the façade of in-the-know crumbles.

The average high school graduate today, according to Bauerlein, spends virtually no time reading – even online. In fact, multiple studies showed that nearly 70% of them are not proficient in reading. Likewise, the vast majority cannot name their mayor, governor, or senator, and half could not comprehend a ballot. Instead, many people these days prefer spending their free time on Facebook. "According to data from Deloitte, 2009 was the year that social media bloomed for [Baby] Boomers, with 47% of them maintaining a profile online, the largest increase of any group from the previous year. 73% of those reported that they actively maintain a Facebook site."⁴

Related to all of this is the oft-repeated concern with the growing deficits in the average American's attention span. Two generations of television, now aggravated by the advent of text messaging and Facebook, have forced college professors and ministers to completely re-tool how they get (and keep) the attention of their audiences. Lawyers have no choice but to follow suit if we hope to have any shot with a typical jury. While criticized by many as an example of the "dumbing down" of American culture, several high-profile churches have resorted to asking their parishioners to "tweat" on Twitter during the sermon (with the blog displayed on a big screen behind the preacher).⁵

It is merely a sign of the times to which litigators (and courts) must adapt. A recent survey in *USA Today* showed that 47% of respondents admit to getting "antsy" if they go an hour or more without checking their text messages, e-mail, or social networking sites.⁶ In fact, in January of this year, the Judicial Conference of the United States, which is the federal court's policy-making body, released to the federal judiciary a model jury instruction expressly instructing jurors not to communicate about the case on which they are an assigned juror via "cellphone, through e-mail, Blackberry, iPhone, text messaging, or on Twitter, through any blog or website, through any internet chat room, or by way of any other social networking websites, including Facebook, MySpace, LinkedIn and YouTube."⁷

So – with the evidence mounting that computers and other digital media are accelerating the "television effect," how can lawyers adapt in the

courtroom to better reach jurors? Ms. Hamlin has several suggestions that a number of noted trial lawyers swear by.

A. Television Techniques to Consider⁸

1. Television news stories are short and designed for brief explanations absent in-depth analysis.

2. Television uses “magic” to suspend time. Television news continually moves from the studio to live scenes on location to a suspended talking head to graphics on the screen. The viewing audience never sees how it gets there. Because of this seamless unexplained movement, viewers have come to believe in and expect what seems like “magic.” Most significantly, this formatting telescopes time and contributes to our raised impatience levels.

3. Television captures the viewers’ attentions and reinforces the message by using graphics and descriptive written words to identify and clarify what is being conveyed. Though this is a respected teaching technique, it lulls the audience into not working too hard to figure anything out on their own. As a result, people learn quickly that they do not have to listen too carefully because television will tell them again.

4. Television uses visuals as the primary message provider. Words and the spoken language is no longer the principal vehicle for conveying messages. Consequently, television has taught the viewer to demand visual proof – pictures.

5. Television edits the visuals that are portrayed so that what looks true is not true. The pictures telecast to the viewing audience are edited by the reporters, and their content and angle of presentation are usually carefully selected by editors and directors, even by the location of the cameramen. Consequently, what the viewing audience sees is not pure truth. Time and reality are distorted.

6. Television conditions its viewers to expect “the bottom line.” Because the talking head is considered boring, it is generally given 30 seconds or less of air time. Thus, what is said is cut, cropped and edited down to the essence of a message decided by the person doing the cutting, cropping and editing.

7. Television provides “story tellers” who deliver the message in a seamless, almost mistake-free flow of words. Because they are reading a pre-prepared story from a teleprompter designed to give the illusion that they are not reading at all. The viewing audience begins to learn that people do not stumble, falter, think, or try again.

8. Television hardens its audience to privacy, sensitivity, caring and concern. The television camera and reporter’s microphone intrude in places, situations and lives where normally we would fear to tread. As viewers, the television audience is uninvolved and becomes passive. Violence and conflict become abstract and