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Cutting-edge ways of introducing and taking evidence

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Speakers

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Digitalisation and social science have reached the litigation world. This panel explored some of the cutting-edge tools supporting litigators in taking advantage of these innovations, making use of big data and psychological insights, or compiling and presenting evidence in a ‘more-than-words’ way. As innovation does not only provide opportunities but also challenges, the panel also discussed boundaries necessary to the use of such tools.

This session brought together experienced litigators and experts who, collectively, presented and discussed the various facets of cutting-edge technology in the collection and courtroom presentation of data. The moderators, through interactive questioning, drew out practical lessons for the audience. The panellists illustrated their remarks with accompanying presentations.

Collecting and presenting data

While the collection of data is still to a large extent based on ‘traditional’ means of receiving evidence, such as information requests and discovery, the panel showed how the interplay with new technologies can enhance the traditional searches. If, as is often the case, information in social networks is publicly available, relationship

analysis software may allow, when tracing assets, to identify close associates of key suspects who may be acting as nominees to hold assets. Based on this information, a new round of traditional information requests can be started in order to find the looked-for funds.

Once information is available, the challenge to present it to a court needs to be addressed. The panel exhibited numerous examples on how data can be turned into a story, by visually mapping connections, creating chronologies with embedded pictures and links, or distilling information into graphs.

Using big data to evaluate potential jurors

A second interesting topic that was covered was the use of technology to locate and distil data from public sources and social media to make informed predictions about the likely predilections of potential jurors in United States courtroom trials. Jury consulting is one of the industries that has arisen in US litigation to mitigate the risks inherent in having the citizenry serve as the ultimate fact finder in complex commercial disputes. The objective is to obtain information that, in turn, will enable a party to make informed judgements about the lifestyles, interests and views of potential jurors. With such profiles, the jury consultant can then create models of desirable and undesirable attributes of jurors in light of the party’s trial objectives. Following mock jury exercises where the mock jurors provide feedback on their reactions to snippets of evidence, jury consultants can even create Monte Carlo simulations of the jury trial, ascribing probabilities to different ranges of damages outcomes.

Hardware and software

Another topic explored by the panel was currently available hardware and software that can support in-court presentations, as well as categories of current day trial graphics (prop graphics, informational graphics and persuasive graphics). The panel presentation also illustrated how modern computer technology allows parties to energise and bring text and data points to life, in otherwise dense exhibits. The presentation went on to demonstrate how a party can ‘build’ timelines of notable events and damage models, thereby enabling a party to make its case more easily comprehended and effective. Finally, the audience was treated to examples of 3D computer animations that were used in actual lawsuits.

Boundaries in collecting and presenting evidence

While new technology provides the opportunity to present a case in the best light and interest of the client, it also has a potential to mislead the court. This was discussed using the example of litigation graphics and pictures. Enhancing and going beyond pure written submissions, graphics can be used to present a non-verbal type of argument, the so-called ‘visual argument’. While assessing such graphics, a court should be aware that:

- photographs that do not provide any relevant evidence can lead people into believing that the claim being asserted is true;

- non-probative photographs inflate ‘truthiness’;
- text added to photographs can elevate argument into fact;
- photographic images are more strongly linked to emotions than text;
- demonstrative exhibits can be confused with admitted evidence;
- visual information can interfere with reasoned deliberation.

The current general rule in the US for the use of graphics, as formulated by the New York Court of Appeals, is that if it would be proper to make a particular statement, then it would likewise be proper to display it. Visual demonstrations are thus to be evaluated in the same manner as oral statements.

Following this, the panel and lively discussion questioned the appropriateness of rules developed in the context of oral hearings and written presentations for the new game to come – the visual argument.

Another field touched upon was the handling of the jury selection tools demonstrated earlier, in particular, including social media information. Courts have shown a variety of approaches ranging from prescription to admittance, including solutions that require the party willing to use internet searches on potential jurors to inform the potential jurors on the specific internet searches conducted on them. Also at this point the discussion showed that a final judicial response to the use of these tools has not yet been found.