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8-2005

### High-Tech Trial Lawyers and the Court: Responsibilities, Problems, and Opportunities

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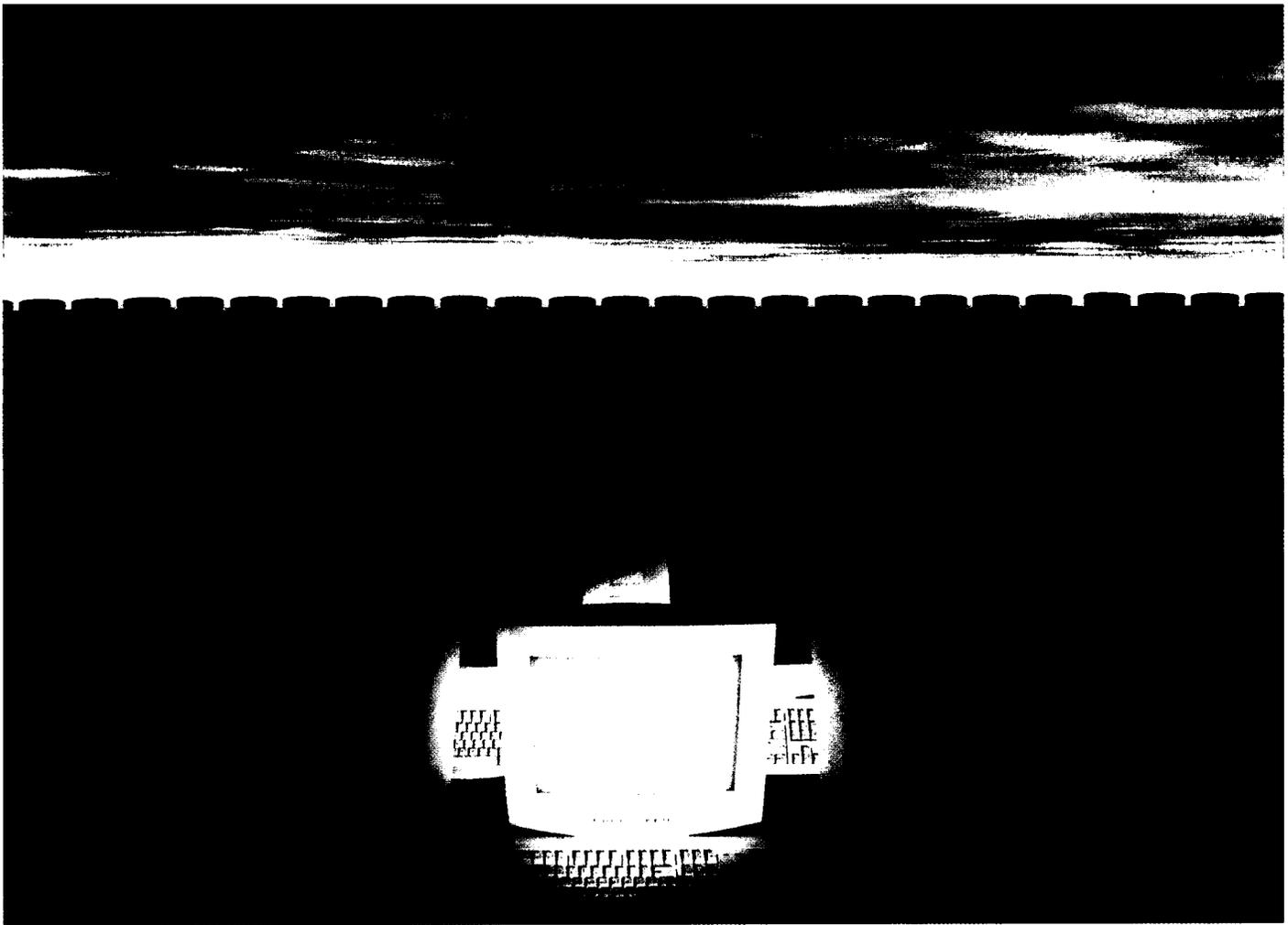
#### Repository Citation

Lederer, Fredric I., "High-Tech Trial Lawyers and the Court: Responsibilities, Problems, and Opportunities" (2005). *Popular Media*. 502.

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*"Excuse me, Your Honor, but I seem to be having a technical problem, may I please ..."*

Although surprisingly few members of the legal profession have fully recognized it, it is clear that the adoption and use of courtroom technology is rapidly becoming the national norm. Data obtained from surveys conducted by the Federal Judicial Center with the support of the Courtroom 21 Project, for example, show that, of 1,366 U.S. district court courtrooms, 363 have permanently installed laptop computer wiring and 370 have some form of nonprojector (*i.e.*, computer monitor) displays for the jury.<sup>1</sup>

How far we have come can also be seen from the intent of the U.S. Department of Health and Human Services to conduct most Medicare administrative hearings remotely, using videoconferencing and the ongoing adoption of electronic case files by the Social Security Administration's Office of Hearings and Appeals.<sup>2</sup> To date, we have been primarily concerned with questions of courtroom design, comparative technology use, and occasion-

ally issues of law relating to that use. What we have not yet come to grips with, however, are the practical implications of the use of technology in terms of the relationship between high-tech trial lawyers and the courts. This is especially true when, for one reason or another, technology appears not to work adequately in courtrooms.

Traditionally, judges assume that counsel will appear in court on time, will be properly attired, and will perform competently. All these expectations can be problematical at times, but everyone understands the legal, ethical, and practical requirements and assumptions behind them. Courtroom technology, on the other hand, is new.

Assume that a trial is taking place in one of the many high-technology courtrooms that dot the United States and Australia and that are slowly expanding in number elsewhere.<sup>3</sup> Having been advised of the availability of the courtroom's technology used to display evidence, counsel in the midst of examining a witness endeavors to use it, only to discover that the courtroom's document camera does not seem to be working,<sup>4</sup> whereupon counsel advises the judge of the problem and requests assistance.

What could or should the court do? An appropriate answer requires that we remember that the "court" pragmatically consists of the judges, court managers, and now,

court technologists. What could be the problem in this instance?

- Counsel may not know how to use the camera properly;
- Counsel may know how to use the camera properly but may have accidentally failed to do so by chance or fluster, or even intent;<sup>5</sup>
- The document camera may have a mechanical or electronic malfunction;
- The judge or deputy clerk or courtroom technologist may have failed to use the courtroom switching system to enable the document camera's image to be displayed;
- The courtroom's video distribution system or switching system may have failed in whole or in part; or
- The courtroom's display(s) may have failed.

Furthermore, in light of the wonders of modern technology, any electronic or infrastructure problem could be a one-time glitch or an intermittent problem that may be amazingly difficult to diagnose. In short, a judge confronted by a lawyer with an apparent technical need may have little idea of how severe the problem may be or what may be necessary to resolve it. It is easy to suggest that the judge should be sympathetic and helpful. The reality, however, makes it clear that the suggestion is overly facile.

The goal of this article is to encourage discussion of the interdependent responsibilities of court and counsel in the context of technology-augmented trials, especially when courtroom technology fails — or appears to fail — to work adequately. Therefore, a review of the general reality related to courtroom technology as it really exists is in order.

## **Objectives**

### ***The Court***

The court's overreaching function is, of course, to resolve disputes fairly. In the real world, the court must do so as quickly as may be possible and use the fewest possible human and financial resources to do so. Most judges appear to wish to be perceived as firm but fair, as people with sound judgment, as good case managers, and usually as courteous individuals.

### ***Counsel***

In the Anglo-American adversary system, attorneys seek to vindicate their clients' positions. For attorneys, success is paramount. From the advocate's perspective, anything that interferes with the presentation of his or her case in a way that can potentially harm the sought-after verdict is highly undesirable. Counsel's interests are not just the client's interests, however. Counsel are constrained not only by law but also by professional ethics, the violation of which can lead to formal sanctions.

The financial picture and the human picture can be at odds. Theoretically, lawyers who represent clients on an hourly basis have no reason to be concerned about wasting time in trial. Yet, those same lawyers often have other

cases pending; the need to devote time to those cases, augmented by a potential interest in marketing oneself to future clients as a cost-saving efficient litigator, may deter them from wasting time unnecessarily. Plaintiffs' attorneys, working on the basis of a contingency fee, presumably want to have the fastest trial possible that is also compatible with winning. Pro bono or government attorneys may not be affected by fees and billing; but, like most lawyers, they usually are also short of time and desirous of efficiency.

## **Technology and the Courtrooms**

In determining who should do what when technology apparently fails in the courtroom, it may prove helpful to consider who has responsibility for what. Viewed from a functional perspective, modern courtroom technology can be roughly divided into evidence presentations, court records, and data access and communications. Evidence presentation has been the primary interest of trial lawyers and the fundamental defining element of a "high-technology" courtroom.

Consequently, we are primarily concerned with problems generated by evidence display technology, which usually consists of input devices, such as document cameras and computers, and display devices, such as computer monitors, televisions, and front or rear projection equipment. Annotatable display devices that permit lawyers to write or emphasize images are hybrids that combine features of both types of technology. At the same time, problems with other technology used in the courtroom are possible, as well. (Court record technology is clearly the province of the court, and problems with these devices may dictate a sudden halt to the proceedings as soon as they are perceived.)

Data access and communications are more difficult to classify. Originally, this type of technology would have referred primarily to the judge's or clerk's access to electronic information in the courtroom, which today could include electronic docketing, access to e-filed materials, case and jury management software, access to legal materials, access to a real-time court record transcript, and general access to the Internet. Now, however, data access and communications could also include court-supplied videoconferencing to provide remote appearances by the judge, counsel, or witness or wireless connectivity to the Internet for counsel. Whereas videoconferencing would be the court's responsibility, wireless connectivity to the Internet is increasingly provided to counsel by private vendors via agreements with the court. Whether problems with such connectivity are primarily the court's responsibility or counsel's seems to be open to debate.

### ***Evidence Display Technology***

Initially, those lawyers who wished to use evidence presentation technology found themselves forced to obtain their own technology and ask the court's permission to bring it into the courtroom and use it. Although many courts now supply the technology, counsel continue to bring their own for a variety of reasons:

- Because the vast majority of modern courtrooms still has little or no technology, counsel may have no choice but to bring their own.
- The courtroom may have its own technology, but counsel may wish to augment it.
- The court may supply a complete integrated high-tech courtroom, but in almost all cases, counsel who wish to use computer-based presentations are required to bring their own notebook computers and connect them to the courtroom's visual display systems. This generally stems from the court's reasonable fear that allowing counsel to insert their own CDs, DVDs, floppy disks, or other media into court-supplied computers would permit, at the very least, computer viruses to unintentionally contaminate the court's computer and network.

When courts do supply counsel with evidence presentation technology, it may be permanently installed in the courtroom or may be portable and installed by the court staff in that particular courtroom for the given case. A number of courts are now using cart-based portable evidence display systems, often with a projector unit that displays counsel's visual materials on a permanent or portable screen.

Courts that supply technology may be classified as either permissive or mandatory. A permissive court supplies technology and permits counsel to use it on a voluntary basis. A mandatory court requires counsel to use the technology installed in the courtroom and may also mandate counsel to provide discovery materials and evidence via computer media. The latter seems more characteristic of federal than of state courts within the United States and more likely to apply to major cases.<sup>6</sup> Mandatory courts are probably setting requirements in order to maximize efficiency in case presentation. Based on anecdotal evidence, it is usually assumed that evidence presentation technology saves a minimum of 25–50 percent of the otherwise traditional amount of time necessary to present a case. The experimentation conducted as part of the Courtroom 21 Project suggests a minimum time savings of about 10 percent even in a short, one-hour, case that includes only a few documents. Given that many people are at least visual learners who will better understand information presented visually as well as aurally, display technology may also assist the finder of fact.

## People and Resources

### *The Court*

It should go without saying that a court consists of far more than its judges; yet we tend to ignore that critical fact too often. In the area of courtroom technology, we must also take into account the court's managers, its administrative staff, and especially the court technologists. Few judges are "techies." When an apparently technical problem arises, those who are well versed in the technology may choose to make a brief suggestion from the bench. If that is insufficient, it would be unusual and probably indecorous for the judge to leave the bench and

try to troubleshoot a problem, especially when the problem is related to counsel's presentation. I know. I've done this occasionally in student cases. Such behavior is disruptive of the judge's role and, if repeated, can compromise the judge's necessary image of impartiality. If the judge is not able to fix the technological problem, who is available from the court staff to help out?

The obvious answer would be the court's technologist, but this solution assumes too much. The average court may not even have a staff member who is well skilled in the technology used in the courtroom as distinguished from a computer specialist or another expert whose job may overlap the area. Courts that have developed or hired courtroom technologists customarily have only a few of them, and, even then, they may not be instantly available, especially in the case of a courthouse that has multiple technology-augmented courtrooms. Courts that have technically trained deputy clerks or bailiffs should be able to provide first-level, immediate, onsite help, but that help is likely to be extremely limited.

The court's senior managers are unlikely to be courtroom technologists and, even if they are, it would be an inappropriate use of their critical skills to ask them to troubleshoot these types of cases. Ultimately, these individuals are important to this discussion because, more than anyone else, they have the practical day-to-day responsibility to determine resource priorities and allocations and to advise the court's judges on the consequences of those decisions. In short, the court manager is the one who ought to know what the court staff can do and to recommend to the judges what the staff should do.

### *Counsel*

Unless one is looking at attorneys who graduated from William and Mary Law School (where every member of the second-year class is required to learn basic evidence presentation skills as part of its award-winning Legal Skills Program) within the last half decade, it is safe to assume that most lawyers have not received law school-based instruction in technology-augmented trial practice.<sup>7</sup> Therefore, attorneys need to develop their computer skills after they graduate from law school. The National Institute for Trial Advocacy has begun to offer instruction in technology-augmented trial practice, and the Courtroom 21 Project now supplies hands-on certification training programs for trial lawyers who want to learn how to use courtroom technology effectively. Federal and state prosecutors have access to the National Advocacy Center and its numerous technology-augmented practice courtrooms. Notwithstanding these efforts, there are few in-depth opportunities for trial lawyers in general to learn presentation skills using technology. This lack of training tends to trigger discussions that focus on the court's responsibility for training the bar, especially when the court unveils a new high-technology courtroom.

The question of the degree to which a court could or should provide the local bar with training assistance is an ongoing debate. Most courts that have high-technology courtrooms seem to have inherently agreed to provide

orientation for attorneys who practice there and to require them to be familiar with the equipment. Thus, these courts supply the bar with some form of information about the equipment in the courtroom — perhaps by videotape or on a Web site — and may provide the bar with onsite opportunities to visit the high-technology courtroom when it is free. Some courts may conduct periodic orientation sessions, and some may set up ad hoc case-specific meetings, which tend to be equipment-specific. These sessions are rarely, if ever, general training sessions — nor should they be, given the courts' duty to remain neutral. When the organized bar is involved, the tendency is to provide lectures or demonstration sessions rather than detailed hands-on training. In short, most trial lawyers are unlikely to easily find comprehensive training in the legal technology used for trial presentations. Of course, that doesn't foreclose appropriate training and education; it just makes it harder to obtain it.

Lawyers have a general professional ethical duty to provide competent representation.<sup>8</sup> If that duty were to extend to competence in the use of courtroom technology — and this author would urge that it does — counsel would have an affirmative duty to learn how to be at least an adequately competent high-tech trial lawyer when attempting to use that technology. With the ethical imperative in play, judges should be able to assume basic competence on the part of counsel appearing before them. They, and the court generally, should not have to assume responsibility for assisting a lawyer with basic operations that a lawyer ought to know. For example, a notebook computer ordinarily will not show its video images on an external monitor (in this case, the display distribution system in the high-tech courtroom) unless the computer is instructed to do so, often by pressing the fn and F8 keys simultaneously. The court should not have to instruct counsel about how to do this. Similarly, unless otherwise set, most computers have default power-saving schemes that will make the computer “hibernate” if it is unused for a long enough period of time. The court should not need to assist a lawyer who complains of catastrophic system failure when the only problem is counsel's ignorance of the need to alter the computer's power-saving setting.

A potential complication comes into play when counsel hires an outside vendor to handle the technology that counsel is using in the courtroom. The position held by the Courtroom 21 Project has long been that, ideally, attorneys should handle their own presentation technology personally. However, the project has qualified that opinion, adding that, if counsel lacks either competence or self-confidence, he or she should use a competent assistant or outsource support needed in the courtroom to a commercial vendor. Should a judge assume that at least outsourced technological support is “expert” support? Does outsourcing potentially deprive counsel of some degree of judicial discretion with the judge, assuming that, even though counsel might merit some court assistance, an expert's help should negate the need?

## Responsibilities

It is not ordinarily the court's responsibility to assist attorneys who are having difficulty arguing law or trying a case. The adversary system assumes competent counsel. The court does have discretion, however, to step in as long as it can do so impartially. The court may even have a special duty to do so in a criminal case in order to protect the rights of the defendant. If counsel has the responsibility to act competently when using technology at trial, what, if anything, is the court's responsibility?

In part, the answer to this question may depend on one's perspective. Is courtroom technology ever the court's responsibility? During courthouse design seminars and at other times, U.S. District Judge James Rosenbaum of Minneapolis has sometimes said that courtroom technology is so essential that it should be equated with lighting, heating, and air conditioning as basic responsibilities of the court. When the courthouse's basic systems fail, no one expects the lawyers to step in and restore habitability.

Yet, even if one agrees with Judge Rosenbaum, does permitting or even providing courtroom technology carry with it the court's responsibility for its maintenance and use? Determining whether the court is a mandatory court or a permissive one could prove not just relevant, but determinative. If the court mandates the use of technology, especially its own technology, one can plausibly argue that the court has voluntarily taken on a special responsibility to assure that its technology works and to assist counsel when counsel encounters a difficulty that he or she cannot reasonably be expected to be able to resolve without help from the court.

At the same time, many members of the legal professions are unsure of how to classify the use of courtroom technology. Some consider the technology an optional frill of uncertain value (a perspective, of course, that is hard to maintain in a mandatory court). If courtroom technology is an elective matter and of no great consequence, arguably its absence or failure is not a matter of consequence to counsel or the court. Of course, if the technology is of such uncertain value, we should be questioning why we are devoting so many substantial resources to installing and using technology in our courtrooms in the first place.

What, indeed, is the consequence of the court's providing courtroom technology to counsel, even on an optional basis? Is it reasonable to argue that the court has done so without assuming any responsibility to ensure that the technology at least works? If the court's courtroom technology does not work, does the court take on any responsibility to passively or actively assist counsel who cannot make the equipment work properly?

The reader should note that there are tentative answers to some of these questions. The Courtroom 21 Court Affiliates, a growing network of state, federal, and non-U.S. courts and government agencies, has propounded the *Courtroom 21 Court Affiliates Protocols for Use by Lawyers of Courtroom Technology*.<sup>9</sup> The protocols can be viewed as emerging national best practices. These questions, however, can be expected to continue to bedevil us, especially in light of the expanding adoption of courtroom technology.

## The Impact of the Realities of Life

In an ideal world, the following assumptions or conclusions could be posited:

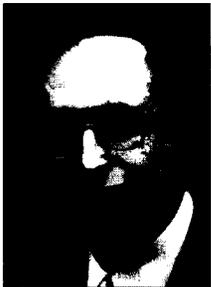
- The court has made sufficient information about its technology available to counsel well in advance of trial.
- Counsel are competent and know how to use their own (counsel-supplied) technology as well as that provided by the court.
- Court-supplied technology is regularly checked each day before trial and is regularly and properly maintained.
- When technical malfunctions occur, they are readily and quickly diagnosable.
- Each court has in the courtroom a technically trained and competent staff member who is readily available to troubleshoot.
- Each court has at least one high-end technologist available to troubleshoot major infrastructure or other equipment problems along with sufficient spare parts for reasonable repair.
- The judge can grant a recess of sufficient length to permit any necessary repairs or adjustments.
- If a delay in presentation is necessary, a party's presentation of the case will not be adversely affected by the problem that has occurred.

Note that, even in an ideal world, a lengthy recess might be necessary in any given case. We do not live in an ideal world, however. In the real world, it is at least possible that *not a single one of these assumptions or conclusions is accurate*. Yet, the court still must deliver justice and do so in an efficient fashion.

Accordingly then, when counsel says, "Excuse me, Your Honor, but I seem to be having a technical problem, may I please. ..." what should the court do? **TFL**

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*Fredric I. Lederer is a chancellor professor of law and director of the Courtroom 21 Project, a joint project of the William and Mary Law School and the National Center for State Courts ([www.courtroom21.net](http://www.courtroom21.net)) located in Williamsburg, Va. Entitled "The Courtroom of the 21st Century," the Courtroom 21 Project includes the world's most technologically advanced trial and appellate courtroom in the McGlothlin Courtroom. Professor Lederer can be reached at [filede@wm.edu](mailto:filede@wm.edu).*



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*as Fredric I. Lederer, Symposium: The Powers and Pitfalls of Technology; Technology-Augmented Courtrooms: Progress Amid a Few Complications, or the Problematic Interrelationship Between Court and Counsel, 60 N.Y.U. SURV. AM. L. 675 (2005).*

## Endnotes

<sup>1</sup>Elizabeth C. Wiggins, Meghan A. Dunn, and George

Cort, FEDERAL JUDICIAL CENTER SURVEY ON COURTROOM TECHNOLOGY 8 (Federal Judicial Center, draft edition August 2003).

<sup>2</sup>E.g., Robert Pear, *Medicare Change Will Limit Access to Claim Hearing*, N.Y. TIMES, April 24, 2005 at 1, col. 6.

<sup>3</sup>High-technology courtrooms outside the United States and Australia include courtrooms in Canada, England, Hong Kong, Israel, Mexico, the Netherlands (Yugoslav War Crimes Tribunal), Scotland, Serbia, and Singapore.

<sup>4</sup>A document camera is a vertically mounted television camera that, when projected to a display device, allows counsel to show images of anything under the camera — customarily documents, photographs, and physical objects. Often referred to as "ELMOs," these cameras are marketed by a wide variety of companies, including DOAR Communications, WolfVision, Samsung, Sony, and ELMO.

<sup>5</sup>Professor Mollie Nichols, the Courtroom 21 Project's associate director for research and professional education and formerly with the Texas attorney general's office, reports that she has encountered lawyers who purposefully fail to use the equipment properly, either because they do not want to appear as slick city lawyers or because they understand that they will fail to use the equipment properly at some point in the trial. Instead, the lawyers portray themselves as "poor country lawyers," bumbling away with the newfangled technology and hoping that the jury perceives their ability to use the equipment as a success, rather than perceiving their incompetence with the equipment as a failure.

<sup>6</sup>Australia's Royal Commissions provide an Australian analog. In these major judicial inquiries (a special combination of what to an American would seem to be a legislative hearing combined with a grand jury session), major technology is made available by vendors who are retained by the court for the duration of the commission. Technology use is then mandatory; the evidence is submitted to the commission's staff in advance and then displayed during the hearing by the commission's staff at the request of counsel.

<sup>7</sup>Every William and Mary Law School student receives basic hands-on training supplied by the Courtroom 21 Project and must then try a simple bench trial using the McGlothlin Courtroom's technology. Students may also take specialized courses in trial advocacy or technology-augmented trial advocacy. An increasing number of other law schools offer elective trial advocacy courses in technology-augmented law school courtrooms.

<sup>8</sup>According to the Model Rules of Prof Responsibility R. 1.1 (2002), "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."

<sup>9</sup>See Fredric I. Lederer, *Symposium: The Powers and Pitfalls of Technology; Technology-Augmented Courtrooms: Progress Amid a Few Complications, or the Problematic Interrelationship Between Court and Counsel*, 60 N.Y.U. SURV. AM. L. 675, 691 (2005).