

A SPECIAL SUBSTANTIVE COLLECTION FROM THE RECORDER

LITIGATION: TRIAL TECHNOLOGY



IPads at trial

With recent advances in technology, attorneys can go beyond the basic apps to make compelling case presentations



Morgan C. Smith

Attorneys often ask me about the use of iPads in their practice, and they especially want to know how the iPad can help in mediation and trial. I start by telling them the good news: that the number of highly functional and practical apps developed specifically for attorneys has increased dramatically, making the investment in an iPad for your practice much more attractive than even six months ago.

Then I tell them it pays to invest at least a few hours to learn how to optimize the iPad for case management and litigation presentations. Otherwise, that cool tablet may stay parked by the bedside as a high-powered tool to read a digital newspaper (or a toy that kids run off with to play Minecraft).

If you're considering spending \$600 on a new iPad, or if you already own one and are figuring out what to do with it, this article will help

by covering some of the key technical issues and apps that assist attorneys in myriad ways.

NEW IPAD VERSUS IPAD 2

Should you buy the latest and greatest iPad? Sure, if you don't have an iPad already. If you have the slightly older iPad 2, it will serve you fine for the foreseeable future, since at present time the best apps for attorneys were designed for the iPad 2 and work equally well on both.

The primary difference between the models comes in the screen and processing speed. The new iPad (which is not officially called the iPad 3, but "the new iPad") has a "retina display" that has a much higher resolution than the iPad 2. This means photographs, images and text appear sharper than on the older model; however, if you are looking at websites, you will probably notice that the photos look bad because the iPad screen has finer detail than lower resolution photos online.

The new iPad also has about twice the processing speed of the iPad 2, which doubled the speed from the original iPad. Additionally, the new iPad works on the 4G network, so download speeds over the networks (at a minimum cost of \$20 per month) are greatly enhanced.

LAW PRACTICE MANAGEMENT

Once the shiny new iPad is out of the box, what should you consider putting on it to help your practice? Far and away some of the most useful apps for attorneys have to do with file management and accessibility.

Apps like Dropbox.com and Box.com are two of the leading "cloud" file management systems around. With these services, you can

access any of your case documents that you put on the server anywhere at anytime from your iPad. You can view PDFs, Word documents, movies and most anything else. These apps really help attorneys have their entire office file system at their fingertips in deposition, mediation, trial or any other situation.

There is seemingly no end to the various billing programs available for iPads and iPhones that attorneys can use to help keep track of time. For solo practitioners and small firms, I personally have been very happy with bill4time.com, which is entirely online and has a good iPhone and iPad app that allows you to enter your time by client and case, and online you can easily create invoices to email to clients.

If you don't already have a good PDF reader for your iPad, I recommend either Goodreader or PDF Reader by Adobe. Either is very important since so many legal documents are in this format. I also recommend iPleading, which creates formatted documents for filing in state and federal courts.

Finally, the Fastcase app provides primary law access for both federal and all states — very handy and free.

PRESENTATIONS

While I like using my iPad for the practice management tasks described above, I'm most excited about using it for presentations. If you're interested in utilizing the iPad to present your case, I have the following recommendations.

You've probably heard about and perhaps even tried creating "e-briefs" to consolidate and

See **SMITH** page 20

Best Practices
DIVERSITY
Making Diversity Work
in Law Firm
& Company Relationships
Wednesday, May 16, 2012
therecorder.com/diversity



Sponsored by



Soldiers of the patent wars
Animesh Kumar 14

Courtroom drama
Tam Harbert 15

Best courtroom projectors
John Edwards 16

Gambling on new trial technology
James Moncus III 18

See more *In Practice* articles online at therecorder.com

- A tale of two agencies
- Defining trade dress
- Tales of mediation
- Plugging the app info leak
- NLRB on social media
- Divided patent infringement: the German perspective
- Rise of probate litigation
- Second quarter marketing
- Policing social media
- Supreme Court torches Prometheus patents
- The perils of ranking
- Supreme Court weighs PPACA
- Resolving arbitrability
- Second District creates conflict in appellate procedure
- ADR hits Europe
- Offshore investment

Soldiers of the patent wars

The nature of IP litigation is shifting from using vast armies of review attorneys to SWAT teams of tech experts



Animesh Kumar

With nearly 20 lawsuits in nine countries, Apple Inc. and Samsung's ongoing legal battles highlight a widespread patent war that shows no signs of a cease-fire. Aggregate damage awards in technology patent lawsuits have surpassed \$4.8 billion since 2006, with individual awards as high as \$300 million in the past three years. There is no doubt that we've entered a new era in patent litigation, that's escalating almost as quickly as the technology in question.

This stands in stark contrast to what was happening few years ago. Smaller patent holders, the so-called trolls, were litigating against large companies, and exposing the true value of technology patents in the process. But with a lower success rate of 21 percent in 2010 — similar to the trend seen in the years prior to the heydays of 2008 and 2009 — the stigma that was attached to the trolls for taking legal action is swiftly disappearing.

Increasingly, litigants are now large practicing entities that spend millions of dollars

Animesh Kumar is co-founder and chief solutioning officer of iRunway, a technology research firm specializing in litigation support and patent portfolio analysis. The company has offices in Austin, Palo Alto and Bangalore, with plans for expansion in New York and Washington, D.C.

on research and product development, trying to protect their business interests against other large corporations. With more "me-too" products entering the market en masse, innovative companies that hold patents will be forced to guard their strategic position in the market. And more often than not, these turf wars will be driven less by monetary goals than by the need to fight and take the competition out.

Large corporations licensing or selling their patents, often noncore, to nonpracticing entities is another trend that's emerging. Apple signing cross-licensing deals with Digitide Innovations (an NPE) is one such example of an indirect route big companies are taking to ward off competition, in this case its "smartphone" opponents.

That said, litigation can be extremely challenging, with an uncertain time line, and more importantly, an uncertain outcome. It comes as no surprise therefore that corporations and law firms are seeking to add more efficient and effective tools in their artillery to fight these technology battles.

With median litigation cost of \$6 million to \$7 million for lawsuits with more than \$25 million at risk, law firms are splitting the process into different streams — of both work content and expense — and looking at ways to increase the predictability of a favorable outcome at reduced costs. While improved vendor management and alternate billing structures are steps in the right direction, these do not directly affect the outcome of the litigation.

The key to a favorable outcome in litigation has proven to be the critical "insight" on the disputed product — the evidence. And the sooner you find it, the lower your cost to take the litigation to a successful

outcome. But an explosion in the volume of electronically stored information and the amended Rule 26 of the Federal Rules of Civil Procedure, which govern production of evidence in most court cases, have made it tougher for the legal teams. Lawyers are beginning to realize that it's not the volume of data, but what you find in it and how soon you find it that matters. Having to keep pace with court deadlines without significant impact in the analysis has

Law firms involved in the growing technology patent arena are increasingly relying on technical insights to win the case — and this insight is most likely to come when attorneys, experts and specialty technologists work together.

also led legal teams to move away from traditional methods of discovery and fact-finding.

Winning these high stakes patent wars does not require a large infantry. In fact, during the past several years, litigation teams have shifted their approach, choosing to replace a large data-sifting force with a highly trained, "special ops" style SWAT team of technologists

whose specific task is finding targeted evidence.

Intellectual property, especially patents, differs greatly from other legal processes. It is technology-intensive and demands a microscopic level of understanding of engineering processes within a legal framework.

Trends within the technology world have revealed a significant, unmet need for technical expertise that enables the legal community to unearth hard-hitting evidence. Imagine a bunch of lawyers analyzing a plethora of white papers and configuration charts around "direct sequence spread spectrum signaling" of 802.11b and 802.11g wireless protocols across 2.4, 3.6 and 5 GHz frequency bands in OFDM modulation! This requires special competency — the measure of which deals primarily with intellectual insight and outcome of the litigation.

Law firms involved in the growing technology patent arena are increasingly relying on these technical insights to win the case — and this insight is most likely to come when attorneys, experts and specialty technologists work together.

One such law firm that has had a lot of success, McKool Smith, has stated that it relies heavily on a single transformational insight that turns the case in the client's favor. And expecting attorneys to arrive at this insight all by themselves moves them away from their core competency as top litigators. Lightening the attorneys' load in this arena increases the overall performance.

Traditionally, it was the smaller firms that had adopted this approach to manage their costs. However, iRunway has seen a dramatic increase in top law firms using this model, at

See **KUMAR** page 20

MEDIATION SERVICES

of The Bar Association of San Francisco

QUALITY ♦ EXPERIENCE ♦ TRUST

- ♦ Professional, prescreened mediators experienced in more than 30 areas of law
- ♦ Biographies, photographs, videos and hourly rates on the BASF Website
- ♦ Use is NOT limited to San Francisco residents or cases

Voted one of the top ADR providers in *The Recorder's* "Best of the Bay Area" 2010 & 2011

SUCCESS STORIES

"We had an excellent experience with our BASF mediator and, after 8 1/2 hours of mediation, settled a very difficult case."

Robert Charles Friese, Esq., Shartsis Friese LLP [Business/Securities/Investment]

"I appreciated the way the mediator interacted with my client. This was invaluable. I would happily use him to mediate a case for us in the future."

Jeffrey Smith, Abramson Smith Waldsmith LLP [Personal Injury Dispute]

"This was the third mediation attempt. And he was far and away the best mediator. I dare say we would not have settled today but for his efforts."

George Yuhas, Orrick Herrington & Sutcliffe [Business Dispute]

www.sfbar.org/mediation



M S & L MILLER SABINO & LEE LEGAL PLACEMENT SERVICES

For twelve years we have been dedicated to providing the Bay Area legal community with superior legal recruiting services.

We are deeply honored to have been voted the #1 Legal Recruiting Company in the Bay Area for the last several years. We are dedicated to providing personal, professional and highly confidential legal recruiting services to all of our candidates and clients.

Please contact us today to discuss your next career move or how we can assist in your firm or legal department's expansion. We look forward to working with you.



Courtroom drama

Broadcast quality, inexpensive video are changing litigation dynamics, but not as fast as expected

Tam Harbert

If you want to know the future of courtroom technology, look at today's smartphones. They started with audio and have increasingly incorporated all sorts of other digital technologies, including voice recognition, photography and even high-definition video. Courts have started to integrate technologies, but convergence isn't happening as smoothly as it has on an iPhone. In fact, far from it. Bound by tradition, historically uncomfortable with technology, and by definition slow and deliberative, U.S. courts are adopting technology in fits and starts. It's a painful process as courts try to bend digital recording technology to fit their processes and procedures while realizing that, by its very nature, technology can transform those same processes and procedures.

The impact of digital recording technology on both audio and video is already changing how at least two key players approach their jobs: court reporters and trial attorneys.

When technology is fully capable of recording a trial, will court reporters become extinct? Some trial lawyers say that the emergence of digital audio and video is revolutionizing litigation, and those who can use the technology most effectively may have the upper hand. As technologies mature and become less expensive, these changes will likely accelerate. (Consider

Tam Harbert (tam@tamharbert.com) is a freelance reporter based in Washington, D.C. This article originally appeared in Law Technology News, a Recorder affiliate.

how advances in high-definition streaming have changed how you watch videos on your mobile devices.)

In courtrooms, digital recording technology is mostly audio, but increasingly video has already started to displace court reporters.

"What's driving the expansion of digital audio and video is the desire to save money by not having to pay court reporters," says Fredric Lederer, chancellor professor of law and director of the Center for Legal and Court Technology at William & Mary Law School. "Many courts have abandoned court reporters either entirely or at least in significant part in order to go to either digital audio recording or digital audio/video recording."

Melanie Humphrey-Sonntag, immediate past president of the National Court Reporters Association, says courts are cutting back. Last year the state of Iowa laid off 26 court reporters, and, according to news reports, has considered using digital technology to replace the reporters. Other states are not replacing people when they retire, and so they are moving to digital by way of attrition, she says.

And horror stories abound about transcripts gone missing or so full of errors as to be rendered useless, as chronicled by the *Austin Statesman*, which detailed evasive reporters and criminal cases that had to be retried because of botched transcripts.

A digital recording doesn't automatically produce a transcript. The rules on whether a written transcript is required as the official court record vary depending on whether the court is state or federal, the rules of the particular jurisdiction and the

predilections of the judge. Nor are rules consistent on whether video technology is allowed in courts, although most allow audio technology.

Much confusion exists over the two components of court reporting: the capture of proceedings, and the production of an official transcript. Capturing the record can be done by stenography, audio or video, says Humphrey-Sonntag. The transcription is what makes that record useful. "It is turning that record into something that other people can read, search and synthesize," she says.

Although technology is gaining on the capture part, most courtroom participants acknowledge that it falls down on the transcription part. Transcripts are only required in high-profile cases, such as a murder trial, where an appeal is likely. However, trial attorneys often want a written transcript of the proceedings in order to prepare for the next day. Although the court will supply them with a copy of the digital recording, it's difficult and time-consuming to work with, says Ted Brooks, president of Litigation-Tech. "It's just a .wav file, so you can't easily find where a particular statement was made."

James DeCrescenzo, president of James DeCrescenzo Reporting, says courts are shifting costs of high-quality transcripts to litigants, "by eliminating the official court reporter's role and substituting for him or her with a piece of hardware whether that's digital audio or video. If it's an important case, many times these attorneys will hire their own court reporter, with the permission of the judge, to go in and act as the official reporter for that case."

There are products that use speech rec-

ognition technology to roughly synchronize digital recordings with a written transcript so attorneys can more easily find things, but court reporters argue that the need for a written transcript, particularly if it's needed immediately, will keep them in the courtroom for a long time. "Instant access to the written word is where court reporters really shine," says Humphrey-Sonntag.

Meanwhile, the use of digital video, in particular, has taken off in the deposition market. A large percentage of depositions are videotaped today, says Brooks. The main reason: it can be a very dramatic way of impeaching a witness.

"In any sizable case today, video is being used," says Eric Weitz, an associate at Philadelphia's Messa & Associates who specializes in complex personal injury cases. Weitz videotapes most of his depositions in large cases. There is nothing more effective in destroying credibility, he says, than showing a video in court of the witness giving a different answer during his deposition to the same question he just answered in court.

Weitz also uses video for remote testimony of expert witnesses. In addition to showing testimony, video can also be used to help illustrate and explain complex topics in court. After all, he notes, most jurors are accustomed to consuming information through video.

Using technology to illustrate things isn't new, of course. Seven years ago, during the murder trial of Robert Blake, video illustrations were used to help jurors follow and understand what might otherwise be dry, scientific testimony on evidence such as

See **HARBERT** page 21

KEEPING UP WITH CURRENT EMPLOYMENT LAW IS OUR JOB.

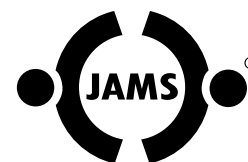
**JAMS NEUTRALS MAKE IT THEIR
BUSINESS TO STAY A STEP AHEAD.**

The **JAMS EMPLOYMENT PRACTICE** includes retired federal, state trial and appellate judges and former litigators. Selected for their substantive knowledge of employment law and skill in handling interpersonal conflict, they also receive extensive, ongoing education on ADR and developing case law. Our distinguished neutrals have years of experience resolving employment disputes ranging from discrimination, executive compensation and whistleblower claims to wage and hour class actions. For more information, visit www.jamsadr.com/employment-practice or call 1.800.352.JAMS.



www.jamsadr.com/employment | 800.352.5267
Scan to learn more about the JAMS Employment Practice.

THE RESOLUTION EXPERTS



Best courtroom projectors

Tips for finding a model that's compact, lightweight and reliable, with appropriate quality and the right price

John Edwards

A few years ago, digital projectors were rarely seen courtroom presentation accessories. No longer. As prices have fallen, the technology has become more widely adopted. These days, the biggest challenge facing a lawyer searching for a projector is selecting the right model.

As with most other computer products, choosing the best projector boils down to balancing features against needs and cost. An inexpensive, modestly powered projector that works well in a small room may prove inadequate in a larger space. An expensive projector loaded with features may be a needless waste of money if it will be used only occasionally in small rooms. Still, when push comes to shove, it's always better to purchase a projector that slightly exceeds your anticipated needs.

Projector terminology can be confusing. To help cut through the clutter, here are some factors to consider.

Resolution: The number of dots (pixels)

John Edwards (jedwards@gojohnedwards.com) is a freelance writer based in Arizona. This article originally appeared in *Law Technology News*, a Recorder affiliate.

a projector can shine onto a screen is critical to image quality. Resolution is typically represented by a pair of numbers (e.g., 1280 x 800) representing the number of horizontal and vertical pixels. Because lawyers must often communicate detailed graphics to juries and other observers, it's important to select a high-resolution projector. For this reason, courtroom projectors are often standard WXGA (1280 x 800) or SXGA (1400 x 1050) models. A VGA (640 x 480) or XGA (1024 x 768) output setting might be used in a smaller room or to project less detailed graphics.

Brightness: After resolution, brightness is the most important factor. It's measured in lumens: A higher number indicates a brighter output. A bright projector will help you overcome challenges posed by screen size, screen distance and ambient light. Yet projector power isn't the only key to image brightness. Using a high-quality projection screen rather than a white board or wall will also help create significantly brighter, livelier images.

Display Technology: Most portable projectors are based on either liquid crystal display (LCD) or digital light processing (DLP) technology. Each presents advantages and disadvantages. LCD systems draw less power, generate less heat and provide more stable colors than DLP models, which

offer smoother video and higher contrast. Other display technologies include compact and efficient light emitting diode (LED) systems and liquid crystal on silicon (LCoS) units, which offer high-resolution images, more weight and higher cost.

Portability: The word means different things to different people. Many "pico projectors" are compact enough to fit into a pocket. And there are hefty projectors that, despite claims, are portable in only the most abstract sense.

When push comes to shove, it's always better to purchase a projector that slightly exceeds your anticipated needs.

Size has its benefits, because smaller projectors tend to be less powerful and feature-packed than larger ones. In the end, it's up to you to determine how much portability you really need.

Functions: Projector makers cram a variety of different input, output, enhancement and control functions into products. Here are some key items:

Zoom lens: You'll need a projector with

a zoom lens to enlarge or shrink the image without moving the projector.

Keystone correction: A projector tilted upward or angled to the right or left will produce distorted images. Keystone correction fixes that.

Contrast control: Having the ability to adjust contrast will maximize the visual impact of charts, diagrams, drawings and other types of detailed images.

Interfaces: A good projector is compatible with leading computer and video standards, such as VGA, composite and analog. If you plan to use high definition digital video, look for a projector that includes support for HDMI output.

Price: Bright, high-resolution, feature-rich projectors are usually more expensive than dimmer, low-resolution, bare-bones models. But a projector should never be judged solely on the basis of its price. Narrow your choices to three or four models that provide features and functions you need. Then think about price and quality. Hint: Check out buyer comments on shopping websites to see what users like and dislike.

Complexity: Look for ease-of-use. Controls and interfaces should be logically labeled and arranged. After the purchase, practice using the projector with your other presentation gear.



3M POCKET PROJECTOR MPRO 180

Type: LCOS 1.3 x 5.9 x 2.5 inches; 11.9 ounces

Maximum resolution: 800 x 600

Brightness: 32 lumens

Computer/video: VGA, composite

MSRP: \$435

Upside: Carry it in a briefcase; projects images from your hand

Downside: Extreme portability requires sacrificing output quality and functionality; limited to use in smaller rooms (bit.ly/LTN122x)



EPSON POWERLITE 1880

Type: LCD 4.2 x 13.5 x 10.3 inches, 7.4 pounds

Maximum resolution: 1024 x 768; HDTV 480i/p, 720p, 1080i, 576i/p

Brightness: 4000 lumens

Computer/video inputs: Analog, VGA, HDMI, USB

MSRP: \$1,399

Upside: Very bright; short throw; moderately portable

Downside: Noisy fan; some users report color balance issues in brightest setting (bit.ly/LTN122j)



OPTOMA NEO-I

Type: DLP 3.1 x 12.8 x 8.9 inches; 2.2 pounds

Maximum resolution: 1280 x 800; HDTV 702p, 1080i

Brightness: 50 lumens

Computer/video inputs: Component, Composite, HDMI

MSRP: \$799

Upside: Easy to set up and use; iPod dock

Downside: Not as full-featured as other products in its class (bit.ly/LTN122m)



BENQ JOYBEE GP2

Type: LED 2.1 x 4.3 x 5.1 inches, 1.2 pounds

Maximum resolution: 1600x1200; HDTV 480i/p, 576i/p, 720p, 1080i/p

Brightness: 200 lumens

Computer/video inputs: Analog, Composite, HDMI, iPod

MSRP: \$699

Upside: Light and portable; abundant features

Downside: Not bright enough for large spaces (bit.ly/LTN122o)



ACER K11

Type: DLP 1.7x 4.6 x 4.8 inches, 1.34 pounds

Maximum resolution: 1280 x 1024; HDTV 720p, 1080i/p/60 576i/p

Brightness: 200 lumens

Computer/video inputs: Analog, VGA, Composite, HDMI

MSRP: \$379

Upside: Plenty of features for not a lot of money

Downside: Not bright enough for large spaces (bit.ly/LTN122e)



NEC NP-M300WS

Type: LCD 5.5 x 15.7x 12.2 inches, 8.8 pounds

Maximum resolution: 1600 x 1220; HDTV 720p, 1080i/p/60 576i/p.

Brightness: 3000 lumens

Computer/video inputs: Component, Composite, HDMI, S-Video

MSRP: \$1,099

Upside: Full-featured general purpose portable projector; very bright; short throw

Downside: Fussy manual focus; heavy (bit.ly/LTN122k)



THE NATIONAL ACADEMY OF DISTINGUISHED NEUTRALS

PROFESSIONAL SERVICE ANNOUNCEMENT

The Academy is pleased to recognize 40 professionals in Northern California for Excellence in the field of Alternative Dispute Resolution, including...



Norman Brand
San Francisco
(415) 982-7172



Barbara S. Bryant
Oakland
(510) 558-0600



Dana Curtis
Sausalito
(415) 331-5158



Scott Donahey
Palo Alto
(650) 823-0338



Paul J. Dubow
San Francisco
(415) 495-6308



Katherine L. Gallo
Foster City
(650) 571-1011



Ruth V. Glick
Burlingame
(650) 344-2144



Urs M. Laeuchli
San Francisco
(415) 670-9602



Chris P. Lavdiotis
Oakland
(510) 433-2600



James R. Madison
Menlo Park
(650) 614-0160



Kenneth M. Malovos
Sacramento/Bay Area
(916) 974-8600



Michael McCabe
San Francisco
(415) 772-0900



David J. Meadows
Oakland
(510) 451-2660



Susan H. Nycum
Portola Valley
(650) 851-3304



Richard Phelps
Oakland
(510) 268-9919



Thomas Reese
Palo Alto
(650) 323-2450



Malcolm Sher
Walnut Creek
(925) 906-0990



Maurice L. Zilber
San Anselmo
(415) 713-1914

Please visit our complete statewide California Chapter roster of members at

www.CaliforniaNeutrals.org

SmartPhone Link



To access our free National Member Database of 700 attorneys in 40 states, please visit ***www.NADN.org*** today

The National Academy of Distinguished Neutrals is a nationwide association of over 700 mediators and arbitrators who have substantial experience in the resolution of commercial and civil disputes. Membership is strictly by invitation-only and is limited to only the most experienced and in-demand neutrals within each state. For more information, please visit www.NADN.org/about.html

Gambling on new trial technology

In a high-profile wrongful death trial, two partners bet that an iPad would help persuade the jury

James Moncus III

One week before starting a trial that would become the largest verdict of our careers, my law partner Matt Minner and I were still debating on how best to present our evidence. We had discussed it before, of course, but couldn't quite come to agreement on the best approach to try a politically sensitive wrongful death case involving the tragic death of a young Alabama police officer, Daniel Golden. Our Birmingham-based firm, Hare, Wynn, Newell & Newton, represented Golden's family and his estate in a civil wrongful death suit that followed the criminal adjudication of the case.

We had settled upon our theory of the case and narrowed down the list of documents to be used as trial exhibits. What we lacked was a comprehensive vision for presenting our evidence and our trial story. As with most cases we take to trial, we had predictably narrowed down our technology options for evidence presentation: inData's TrialDirector (with a dedicated IT professional in the courtroom), or a low-tech approach with old-fashioned blow-up foam boards.

In the context of our case, either choice offered advantages and disadvantages. We wanted to give the jurors a sense of intimacy with the evidence, without excessive back-and-forth communication between the lawyers and the IT professional running TrialDirector. Often, there is an intangible but dramatic power and immediacy when a lawyer shows the jury a foam board representing a key document in the case. But just as a little bit of salt perfects a steak, but too much ruins it, too many foam boards can backfire, and we anticipated that we had too many exhibits to easily use and manage foam boards. This clearly favored the use of TrialDirector, which we normally use only in complex medical malpractice trials or product liability cases that typically involve many hundreds — and sometimes many thousands — of documents.

Let's put our dilemma in the context of our case posture. In 2005, Golden was a 27-year-old police officer with the Huntsville, Ala., police department. Huntsville is Alabama's third-most populated city. It is home to NASA's Marshall Space Flight Center and is surrounded by dozens of space,

James Moncus III (jamie@hwnn.com) is a trial lawyer with Hare, Wynn, Newell & Newton, based in Birmingham, Ala. This article originally appeared in Law Technology News, a Recorder affiliate.

military and defense contractors, so our jury would be well-educated and tech savvy, and would undoubtedly include at least a few engineers and government contractors.

On a slightly rainy, warm afternoon on Aug. 29, along the outskirts of the city, Golden responded to what he perceived to be a routine domestic disturbance at the Taqueria Jalisco Mexican Restaurant. The 911 call was placed by Laura Castrajon, the wife of the assailant, Benito Albarran. Tapes revealed a frantic young woman worried about her own safety as well as the safety of others. Her husband was drunk and "fighting," she told the 911 operator.

Golden arrived alone and stepped out of his patrol car. From the eyewitness accounts, he hadn't quite taken four steps toward the

From opening statement to closing argument, we were never more than a few steps away from quickly accessing any document in the case, enlarging it for the jury through the projector with a pinch of the iPad's touchscreen, and annotating the document with colored circles, lines or just highlighting portions of text in a long police report.

front door of the restaurant when Albarran, who was hiding along the front of the building, suddenly opened fire. Although struck by Albarran's gunfire, Golden managed to free his Beretta service pistol and fired several shots before it jammed. Albarran, the restaurant's cook and manager, approached the wounded officer, who was seated on the ground and struggling to unjam his weapon, and fired, at point blank range, two fatal bullets into Golden's head.

WHO WAS LIABLE?

On June 19, 2008, Albarran was convicted of capital murder, and subsequently sentenced to death. After that verdict, our firm began to investigate a separate civil case



JASON WALLIS

against the Jalisco Restaurant. Initially, it was clear that the restaurant could not be held vicariously liable for the acts of Albarran due to his intervening criminal act. In other words, the crime was obviously outside of the line and scope of his duties and thus Jalisco could not be held accountable for the employee's criminal actions.

However, further investigation revealed that Albarran was probably intoxicated during the event. Later, we were able to trace back his intoxication to beer provided by the Jalisco restaurant in violation of several Alcohol Beverage Control regulations. Furthermore, we were able to link Alabama's 100-year-old Dram Shop Act (which generally prohibits serving intoxicated individuals) with the restaurant's ABC violations in allowing an employee to consume alcohol. Under these two laws, it would be illegal to allow Albarran, an employee, to drink Jalisco's beer during working hours. Thus, if we could ultimately prove what we believe occurred, Jalisco could be held civilly liable for Officer Golden's death under both the 1909 Dram Shop law and the ABC regulations.

In April of 2011, we began the trial. We structured our trial plan and presentation around these overarching themes, using the ABC regulations and Dram Shop provisions as key demonstrative exhibits. In addition to our live witness testimony, we would need a variety of medical records and films, several police investigation reports and witness statements, the 911 transcript and audio tape, several diagrams and photos, and the ability to play a videotaped deposition. In all, we had more than 45 key trial exhibits,

which we felt would be easily manageable in most any presentation system.

PRESENTING THE EVIDENCE

In view of our focus, and the challenges the case presented, we decided to take an entirely different approach — and turn to an Apple iPad for our trial evidence presentation. We would still use a couple of documents blown up on foam boards, for effect — but we didn't use TrialDirector or bring in an independent IT professional. Everything was managed directly from counsel table with minimal hardware and technology.

Just prior to trial, I purchased all three of the then-available trial presentation apps from iPad's app store — Exhibit A, Evidence and TrialPad. From testing, all three were functional for most purposes, but just before trial I chose one and stuck with it, TrialPad (www.trialpad.com). Cost: \$89.99.

I kept all trial documents loaded on the other two apps as a back-up. To be sure, there were some minor glitches. For example, in testing we discovered that not every app supported each document format needed. Some could not play audio (our 911 tape), or display video (our trial video deposition). But we worked around these idiosyncrasies and displayed all trial content on the iPad.

To do so, we used the native iPad video app to play the trial video deposition with synced transcript and the native iPod app to play the 911 tape, which was converted into an MP3 file. Switching between applications, while perhaps not ideal, was quick and

See **MONCUS** page 20

CO-COUNSEL

See what a line can do for your firm.

At California Attorney Lending, our flexible credit lines give litigators the financial resources to stay in charge of their cases and eliminate the need for co-counsel relationships. By viewing your firm's contingent fees as its most valuable asset, we can provide much more financing than a bank, giving you all the funds necessary for case costs, medical reports, advertising, life care plans and more. Call us today to see how we can help your firm.

California Attorney Lending
The power of attorney funding.®

EXCLUSIVE ENDORSEMENTS



ACCREDITATIONS



1-866-522-0216

CalAttorneyLending.com

California Attorney Lending is a licensed lender and broker under the California Finance Lenders Law. © 2012 California Attorney Lending, LLC. All rights reserved.

THOMSON REUTERS

WESTLAW™



A BEAUTIFUL BLEND OF DRAFTING SOFTWARE AND WESTLAW RESEARCH TOOLS

WestlawNext® helps save you hours of time by allowing you, via **Briefs and Motions**, to efficiently access the on-point information you need when researching a case. Better understand what went on in a case before the final ruling and discover relevant authority cited in related filings. Best of all, with **Westlaw® Drafting Assistant's** "Locate Authority" feature, you can immediately find on-point citations from relevant cases and filings arguing the same point of law without leaving your word processor. Why disrupt your drafting rhythm or add hours of research to your weekend? Westlaw Drafting Assistant's integration with WestlawNext puts it all at your fingertips.

To learn more, visit westlawlitigator.com or call 1-800-REF-ATTY (1-800-733-2889).



MONCUS

Continued from page 18

flawless with a double-tap of the iPad's home button.

Highlighting words, phrases or key portions of documents was easily handled on the iPad's touchscreen by simply moving a finger to select the portions of the document that needed emphasis. As with TrialDirector, this can be accomplished in real time as the lawyer or witness is reading the document aloud.

From opening statement to closing argument, we were never more than a few steps away from quickly accessing any document in the case, enlarging it for the jury through the projector with a pinch of the iPad's touchscreen, and annotating the document with colored circles, lines or just highlighting portions of text in a long police report.

We brought our own regular computer speakers to the courtroom, with a compact auditorium-style speaker as a backup. We also used our own portable large screen for the jury — it was positioned in such a way so that it was also visible to witnesses and the trial judge. (If the courtroom had been equipped with monitors for the jurors, witnesses and the judge, we would have plugged in to that existing system.)

With a long VGA cord and adapter connected to the projector, we could walk with the iPad as we moved about the courtroom, or rest the device on a gallery rail while examining a witness. For the times when audio or video was played, a small audio cord ran from the iPad's audio output to the speaker.

TIMING IS EVERYTHING

The iPad's 10-hour battery life meant we never had to worry about crashing — but we were very careful to start each day with a full charge, as the iPad will not support charging while in display mode, due to its single dock

connector port.

Another feature that became vital during witness examinations was the iPad's ability, like TrialDirector, to process mark-ups and highlights on documents. We could "time" our delivery of images, because the iPad allows users to enlarge portions of documents without the image feeding to the projector until the "active" indicator is pressed. This meant one of us could sit at counsel table readying a document for impeachment while the other lawyer examined the witness.

Similarly, TrialPad could mark "hot docs" as well as help us organize documents into separate folder — so we could create folders for opening, closing and each witness. As new documents and demonstrative aids were needed, we used Dropbox, a web-based document storage and transfer system. With it, our colleagues at the office could transfer documents directly to our iPad trial app, ready for use.

One moment where the device's brilliance became apparent came when we were examining a witness about the alleged signature of Albarran on a beverage receipt signed the day of the shooting. The restaurant took the position that he was not an employee nor was there any evidence he working that day. With the pinch and zoom feature of the iPad's touchscreen, what was almost an illegible faded receipt showing an obscure signature became "exhibit one" in our case for establishing Albarran's employment — and presence at the scene on the day of the crime.

On April 19, 2011, the jury returned a verdict in favor of Golden's family in the amount of \$37.5 million, assessing damages of \$25 million against Albarran as well as \$12.5 million against the Jalisco restaurant. No appeal was filed and the time for appeal has expired.

SMITH

Continued from page 13

hyperlink all of your case documents for easier reading and sharing. Typically, e-briefs are created as PDFs. An e-brief created for and displayed through an iPad, however, has numerous advantages over a simple PDF brief. E-briefs for the iPad can incorporate photographs, videos and best yet, 3D-modeled images that you can rotate 360 degrees with your finger by swiping the image. This presentation format has great potential for mediation and trial, as it allows you to project the brief on a screen for use as an interactive PowerPoint type of presentation. To learn more and download a sample iPad e-brief for viewing, go to cogentlegal.com/blog and search for "e-briefs" to find the downloadable link and instructions.

If you're looking for a more traditional method of presenting a case, either in mediation or trial, the iPad offers many different ways in which to do that as well. My all-time favorite is Keynote, which works in a linear presentation format like PowerPoint, but frankly works much better than PowerPoint. Keynote can be installed on both a desktop computer or in a version available on the iPad itself, both of which can be used to create and modify all the slides. While I like to create the Keynotes on a desktop Mac, if you do not have one, you have all the same functionality right on your iPad. The program has templates to start with, allows easy import of photos and video, adding drop shadows and drawing basic shapes.

For those of you who are determined to stick with PowerPoint rather than transitioning to Apple's Keynote, there are options as well. Slideshare is a free app from the iTunes store that allows you to set up an account online and upload your PowerPoint to the site, where it is made into an iPad-friendly format for viewing. Unfortunately, videos do not work on it, but it does a very good job with most everything else. It's extremely useful if you already have a PowerPoint made and simply want to show it on an iPad.

Another option for PowerPoint presentations with the iPad is an app called OnLive, which allows you to create and modify PowerPoints, Word documents and Excel sheets right on your iPad. With the premium version, you get access to Dropbox.com so you can bring up any of these files right on your iPad.

ADDITIONAL EQUIPMENT FOR PRESENTATIONS

Once you create your Keynote or e-brief, you have a few choices of how to present it. The easiest way is to buy an adapter for the iPad that costs about \$25 and has either an HDMI or a VGA output. Most modern projectors accept HDMI, which allows sound through the same cable as the video feed. I

have the Epson 1775W Multimedia Projector (costs around \$1000), which is a nice, easily portable choice, but many other projectors on the market work well, too, some for half the price if you don't care about widescreen or wireless.

Then, using the adapter, you simply hardwire your iPad to the projector; when you start the Keynote presentation, the iPad recognizes that it has an external display attached. You will see the presenter screen on your iPad, which indicates the current slide, the next slide up and any notes you have added, but the audience sees only the current screen projected. It's quite easy and pretty foolproof.

If you want a setup that allows you to freely roam the room and not be tethered to your projector, there's another way to go. If you purchase an Apple TV device (\$99), and both your iPad and Apple TV (generation two or later) are connected to the same Wi-Fi signal, then you can use the Air Play function to wirelessly connect to the Apple TV. (The Apple TV device is connected by an HDMI cable to your laptop.) This setup will allow you to hold your iPad anywhere in the room within the Wi-Fi signal and control the presentation. It's by far the best way to go, but a bit more technically complicated.

At last year's American Board of Trial Advocates Masters in Trial MCLE event, I prepared the opening statement graphics for the plaintiffs in a Keynote presentation that was controlled wirelessly from an iPad held by my former law partner, Robert Arns. Judge Jon Tigar of Alameda County Superior Court praised the use of the seamless technology with a powerful oral presentation and said both enhanced each other. It just goes to show that when done well, this technology can really help attorneys present their cases and connect with the judge and jury.

One potential problem with the remote setup describe above is that you cannot necessarily rely on the location where you're presenting — such as a courtroom or mediator's office — to have Wi-Fi you can access for the presentation. For this reason, I also recommend getting an Apple Airport Extreme that creates a Wi-Fi spot wherever you plug it in. If you set this up beforehand, then both your iPad and Apple TV will find and connect to it as soon as you plug it in, and it provides the Wi-Fi connection.

There's no question the iPad is becoming a much more useful tool for case presentations and should be considered by any attorney for use at mediations or in court. I had the chance recently to test out an iPad presentation in one of the "tech ready" federal courtrooms in San Francisco, and I'm happy to report that with a simple VGA adapter, my iPad plugged right into the system and worked with no fuss. If you can use the iPad that easily in federal court, you can use it anywhere.

KUMAR

Continued from page 14

times bypassing the standard document review process, to deliver the best possible outcome for the clients at lower costs — sometimes as much as 50 percent cost savings. These firms realized that specialists provide a deep understanding of technology that helps them build powerful and successful arguments in court.

These specialists have proven their mettle in many instances, helping the lawyers realistically and efficiently assess the strengths and weaknesses in a case from the perspective of the alleged product and the code in question. They do this by speeding the evidence-gathering process, increasing the depth of the evidence, and improving the quality of the final argument by laying the groundwork for the expert to put together the final report.

Attorneys always lead the effort, managing

the legal process, and more importantly, the case strategy, while technology specialists navigate the seemingly endless swamp of code and find the important elements. They are able to do this effectively because they understand what is critical and noncritical in relation to the specific code and the greater world of technology.

Working with a SWAT team of technology specialists provides the much-needed leverage to the expert and enables attorneys to better manage the process, increase efficiency and, ultimately, succeed.

What can dramatically alter the course of technology litigation is that "secret sauce" of high-end technology competency. It is not the process that matters so much as the "eureka" moment in a litigation that unearths powerful evidence. Technology insights that can lead to a positive business outcome is a new kind of intellectual arbitrage, and one that will play a crucial role in litigation in the near and long term.



Probate Specialist



Hon. **Richard Flier** (Ret.)
\$400/hr



Hon. **Ina Levin Gyemant** (Ret.)
\$400/hr



Hon. **Thomas Hansen** (Ret.)
\$425/hr



Hon. **Laurence Kay** (Ret.)
\$550/hr



Hon. **David Lee** (Ret.)
\$400/hr



Hon. **Rosemary Pfeiffer** (Ret.)
\$385/hr



Michael McCabe, Esq.
\$350/hr



Brian McDonald, Esq.
\$475/hr

www.ADRSERVICES.org

San Francisco | Silicon Valley | Century City | Downtown LA | Orange County | San Diego
(415) 772-0900 (408) 293-1113 (310) 201-0010 (213) 683-1600 (949) 863-9800 (619) 233-1323

HARBERT

Continued from page 15

gunpowder residue, says M. Gerald Schwartzbach, the Mill Valley attorney who successfully defended Blake. “The scientific testimony can be really boring,” he says. “But if you intersperse this type of technology in with it, at least it keeps the jurors awake.”

But substantial barriers remain to using video in the courtroom. First, although costs have come down, it’s still expensive. And the use of elaborate, broadcast-quality video can raise the issue of whether wealthy clients with tech-savvy lawyers get more effective representation.

More important, there is significant resistance by judges and court officials. Judges, after all, are responsible for the smooth operations of their courts and often do not want to complicate things by introducing technology, particularly if it’s unreliable.

And recordings can backfire. Ron Hedges, who served as a federal magistrate judge from 1986 to 2007, once had the audio recording system fail and had to “redo” the proceeding. “At the second hearing I was satisfied that a witness perjured herself by changing her testimony,” he says, “at which point I recused myself and asked the U.S. attorney to prosecute.”

The physical layout of the court can be a barrier. Most courts weren’t built to accommodate technology, so often there are no electrical outlets, or not enough in the right places. Some venues cannot accommodate big screens. Even when courts are modernized, technology can create subtle problems for litigators. Some courts have installed individual screens for each juror in the jury box, Weitz says. “So now I’ve got a jury looking down at a screen in front of them rather than watching witnesses, and reactions, and one common image.”

The rules of civil procedure and discovery, while they are beginning to adjust to

technology, aren’t evolving nearly as fast, says Weitz. For example, in personal injury cases, video may create prejudice. “In a nursing home case you may historically have shown a photo of a terrible ulcer caused by improper care of grandma,” he explains. “Now, you could put up a high-def picture, blow it up to the size of Alaska on a screen in front of everybody. It’s gruesome. It’s inflammatory.”

Even the placement of microphones and cameras disrupt tried and true techniques, says DeCrescenzo. Attorneys like to stand in particular places, such as at the end of the jury box because they want the witness to turn to talk directly to the jury. But there may be no microphone or camera at the end of the jury box. “So something they’ve learned to do over the years — now they can’t do it,” he says.

But in the end, new technologies are going to change the courts — it’s just a matter of time.

VENDORS AND PRODUCTS

Barkley Trial Technologies, a division of Barkley Court Reporters, offers presentation and video services.

ForTheRecord provides digital and video products.

Jefferson Audio Video Solutions specializes in courtroom recording systems.

Norab Systems offers speech recognition systems that can be used to sync written real-time transcripts to video.

Trial Technologies delivers a variety of trial presentation services, including HD Superdepositions.

ViQ Solutions offers digital audio and video capture and management for courts and law enforcement.

Visionary Legal Technologies offers voice recognition to sync written transcripts to audio and video recordings. A new product line creates a rough real-time transcript while videotaping.

West LiveNote is real-time transcript and evidence management software.

GOOGACLE

Continued from page 1

CEO Scott McNealy. There was even a brief appearance by Oracle President and CFO Safra Catz, named one of the highest-paid and most-powerful women in business.

“Will Mr. Ellison be returning to testify about the claim limitations?” U.S. District Judge William Alsup asked, at least half in jest.

Probably not, said Oracle counsel Michael Jacobs of Morrison & Foerster. Instead, his team plans to call techies from Google as adverse witnesses, as well as its technical expert.

The lawyers are still fighting over whether Oracle will be able to again put on Google engineer Tim Lindholm. He’s the man behind Oracle’s key piece of evidence: an email in which Lindholm seemed to say Google needed to license the Java technology now in dispute in the case.

“They want to be bring Mr. Lindholm back on a rather far-fetched theory,” Van Nest said, referring to Lindholm’s time at Sun. “They want to parade him around as having prior knowledge.”

Oracle has made its own motion to stop Schwartz, the head of Sun when it was acquired by Oracle, from testifying about whether Sun made any decision to sue Google over Android while he was in charge of Sun.

When Schwartz was on the stand during the copyright phase, Van Nest asked him if there was “a decision not to pursue litigation against Google over Android?”

Schwartz: “Yes. We didn’t feel we had any grounds.”

In papers filed late Thursday, Boies, Schiller & Flexner partner Steven Holtzman said that kind of testimony would be impermissible for several reasons, including that it’s “simply untrue, to the extent that it is offered to suggest that Sun, the company, had made

an affirmative decision not to sue Google over Android.”

Google hadn’t yet responded at press time.

Alsup asked the attorneys if they could work out a deal where “peripheral” witnesses like Schwartz and Lindholm weren’t called.

On Friday afternoon, the jury indicated it had reached unanimous decisions on all but one of the four copyright questions. Instead of receiving a partial verdict, Alsup asked them to continue deliberating today on the unresolved question.

“We’ll try to do it,” Van Nest offered.

The patent portion of the trifurcated trial will begin as soon as the jury delivers its verdict. And that could be as soon as today.

On Friday afternoon, the fourth full day of deliberations, the jury indicated it had reached unanimous decisions on all but one of the four copyright questions. Instead of receiving a partial verdict, Alsup asked them to continue deliberating today on the unresolved question.

The patent portion of the trial is expected to take as little as a week, lawyers estimated. Only two patents are in dispute, and Google is no longer asserting an invalidity defense. Each side will get 45 minutes for openings.

SAN JOSE

Continued from page 1

open the seat for which Colin is running. Last month, Brock told *The Recorder* that he had written a letter of recommendation for Colin’s appointment application, and said he has a personal interest in someone “good” replacing him. Colin says he has a “reputation for fairness,” pointing to a matter where he declined to institutionalize a convicted sexual predator whom doctors said had been rehabilitated, despite having a legal avenue for pursuing the case.

Colin, whose first career was in business at Xerox Corp. and high-tech startups on the East Coast, has also done the most fundraising in his race — he’s collected \$26,000, including a \$2,500 loan, according to his most recent campaign finance filing, which tracks donations through mid-March.

One of Colin’s opponents, though, says seeking endorsements can get awkward when one is too well-known to the local bench. Alexis Cerul, 46, a staff research attorney with the Santa Clara court, said his close professional ties have prevented him from seeking or getting the same number of endorsements as Colin.

“I’m not going to trade on my friendships or my professional relationships” to get endorsements, he said. “That’s working against me, and there’s nothing I can do about it.” Cerul also hasn’t collected contributions, he says, except for \$4,500 he loaned himself, and \$500 he says his parents insisted on sending.

Instead, Cerul says he has the best ties to the non-legal community — he and his wife, a fourth-generation San Jose resident,

live blocks from numerous members of their large extended family and the Mexican restaurant the family started some 50 years ago. He’s also been endorsed by several labor groups, including the local chapter of the Service Employees International Union. When addressing the unions, Cerul says, he tells them his experience as a staff research attorney has been like an apprenticeship — and now he’s ready to be a journeyman.

“You’re entitled to have a judge who is like you and who would do what you would do,” said Cerul, adding that his “regular guy” identity would provide much-needed socioeconomic diversity to the bench. Cerul points out that opponents Colin and Christopher Cobey, an employment law defense special counsel at Littler Mendelson, earn more than he does.

But Cobey, 63, says his litigation and courtroom experience is his calling card in this race.

“I have been a lawyer for longer than both of my opponents combined,” he said, adding that he’s running because a judgeship is an opportunity to “change from being an advocate to being a person who can do what he or she thinks is right.”

Cobey joined Littler in 1993. Prior to that he worked as a deputy district attorney and ran for the state Legislature in 1978. Politics is of particular interest to Cobey, who counts psephology, or the study of election returns, as one of his hobbies. According to campaign finance filings, Cobey has raised just over \$11,000, \$6,000 of which he loaned to himself. Cobey, like Colin, has significant numbers of endorsements from judges, but many of them sit or sat in other jurisdictions or federal court. Cobey says this reflects his practice, as he has ap-

peared in many courts. He is also the only candidate who doesn’t live in Santa Clara County — he and his wife reside in Redwood City.

THE OTHER RACE

Just two candidates — Sevely and Steven Pogue — are in the running to fill the seat vacated by Neal Cabrinha. Pogue, 57, maintains a general practice on the San Jose and Milpitas border and has a shorter list of endorsements than Sevely. But he says his connections with past and current clients are significant to his campaign. His client base includes many Spanish- and Vietnamese-speakers, as well as Filipinos. He says during previous election seasons he’s gotten dozens of phone calls from clients who want to know how to vote for judge.

“I deal with issues that arise between everyday people,” said Pogue, who is fluent in Spanish and speaks it in the home he shares with his family of seven children. Pogue, who attended Lincoln Law School at night and graduated when he was 38, also counts his wide variety of experience — from felony jury trials to probate and family law matters — as a major plus. Most sitting judges have “only done one thing” prior to their judicial careers, and most of the time that prior work is in criminal prosecution, he said. His candidacy, he said, is an alternative to that.

“In terms of understanding the criminal courts, yeah, [Sevely’s] probably got me, but I’ve got the wide breadth of experience,” he said. According to campaign finance forms, Pogue has only received \$450 in donations, but he’s loaned his campaign \$5,000.

Sevely, the daughter of a JAG Corps at-

torney who has spent most of her career in the Santa Clara DA’s office, said she doesn’t think Pogue’s broader experience will hurt her on election day, pointing to her long list of endorsements. As of mid-March, Sevely had raised \$5,000. Like Colin, she touts her reputation for good decision making.

“A prosecutor is always interested in fairness, and that’s why I became a prosecutor,” she said. In particular, Sevely said she is interested in protecting the rights of *pro per* litigants — who she says often feel pressure to plead guilty so that they won’t miss work — and working with public defenders to recognize when litigants are struggling to make hearings due to logistical challenges like relying on the bus or not having access to a phone.

“I like to fix problems,” she said, adding that in her time at the DA’s office she has often been charged with big firsts, such as cleaning up backlogs in special projects and running the AIDS litigation unit in its infancy.

When new assignments come along, she said, “I don’t shy away from it.” Sevely also currently manages the intern program in the office, and says helping young volunteers is of particular interest to her — an interest she’d like to bring over to the court, perhaps pioneering a more extensive intern program there.

“I want these kids to be successful,” she said. “I want them to learn about ethics, and standards, and that if you don’t have your reputation you have nothing.”

The election is scheduled for June 5. In the three-person race, if Colin, Cerul or Cobey don’t get a majority of the votes, the top two finishers will face each other in a November run-off.