

THE NEW RAZZLE DAZZLE:¹ QUESTIONING THE PROPRIETY OF HIGH-TECH AUDIOVISUAL DISPLAYS IN CLOSING ARGUMENT

INTRODUCTION

In June 2002, a jury convicted Michael Skakel of the murder of Martha Moxley, a murder that had taken place more than twenty-five years earlier.² Skakel and Moxley had been friends and neighbors in the wealthy community of Belle Haven in Greenwich, Connecticut, when Moxley was found dead on Halloween of 1975.³ The prosecution used multimedia technology throughout Skakel's trial to present pre-admitted exhibits; however, it was the use of a high-tech audiovisual display during the prosecution's closing argument that is thought to have "connect[ed] the dots" for the jury.⁴ Prosecutors, defense attorneys, and impartial observers universally agreed that it was the "multimedia display [that] convicted Michael in the end."⁵ Skakel appealed his conviction to the Connecticut Supreme Court.⁶

1. An allusion to the satirical song in the musical *Chicago*, "Razzle Dazzle," that reinforces the notion that lawyers manipulate, deceive, and distort with "fancy footwork" and attractive distractions. "Give 'em the old razzle dazzle / Razzle Dazzle 'em / Give 'em an act with lots of flash in it / And the reaction will be passionate." FRED EBB & JOHN KANDER, *Razzle Dazzle*, on CHICAGO—A MUSICAL VAUDEVILLE (Arista Records 1975).

2. Lev Grossman with Simon Crittle, *Martha, R.I.P.*, TIME, June 17, 2002, at 34, 34.

3. Joel Lang, *Martha's Murder*, HARTFORD COURANT, May 18, 1997, (Magazine), at 10, 11–12.

4. See Brian Carney & Neal Feigenson, *Visual Persuasion in the Michael Skakel Trial: Enhancing Advocacy Through Interactive Media Presentations*, CRIM. JUST., Spring 2004, at 22, 24, 28 (quoting Suzanne Smalley & T. Trent Gegax, *At Long Last, 'Martha's Day,'* NEWSWEEK, June 17, 2002, at 36) (describing in detail the custom-designed interactive "toolbox" used throughout the trial and its effect on the jury); John Springer, *Kennedy Cousin on Trial: Prosecutor Calls Skakel 'Spin Master' Who Tried to Cover Up Evidence*, COURT TV, June 3, 2002, <http://digbig.com/4gfbx> (relating the Moxley's impressions on the closing argument); *48 Hours Investigates: Ghosts of Greenwich Part II: New Clues In Moxley Case* (CBS television broadcast Sept. 10, 2003), available at <http://digbig.com/4gfwx> [hereinafter *Ghosts of Greenwich II*] (explaining how the prosecutor connected the dots with the multimedia display).

5. *Ghosts of Greenwich II*, *supra* note 4; see also Robert F. Kennedy, Jr., *In Defense of Michael Skakel*, ATLANTIC MONTHLY, Jan.–Feb. 2003, at 51, 74 ("Observers . . . credited Michael's conviction to [the prosecution's] dramatic summation."); Grossman with Crittle, *supra* note 2, at 35 ("It was Benedict's summation that turned the tide."); Joe Miksch, *Pity Poor Michael*, FAIRFIELD COUNTY WKLY., June 13, 2002, available at <http://digbig.com/4gfxe> (discussing the general consensus among the media that the prosecution won the case based on its closing argument rather than on the merits).

6. Oral arguments in *State v. Skakel* were heard by the Supreme Court of Connecticut on January 14, 2005. Press Release, State of Conn. Judicial Branch, Press Advisory re: State of Conn. vs. Michael Skakel (Jan. 11, 2005), available at <http://digbig.com/4gfd>. The issue of the propriety of the State's closing argument was not reached in the time allotted. See John Springer, *Michael Skakel's Defense Points to Legal Loophole in Appeal of Murder Conviction*, COURT TV, Jan. 14, 2005, http://www.courtvt.com/trials/moxley/011405_ctv.html ("Both sides spent about 20 minutes of their

On appeal, the defense asserted that the audiovisual display in the State's rebuttal closing argument was prejudicial "because it vastly distorted the meaning and import of the images presented and appealed to the passions, prejudices and emotions of the jury."⁷ The use of enhanced displays in legal proceedings has expanded greatly in recent years. For those who had the resources and the inclination, hand-drawn charts were replaced by sleek professional graphics, which, in turn, were replaced by PowerPoint presentations. "[I]ntegrated evidence presentation systems" are the newest tools available to lawyers who can afford them.⁸

Many argue for the persuasive value of high-tech audiovisual displays and speak for their fairness and propriety.⁹ This Note explores countervailing arguments and suggests limitations on the use of these presentations in closing arguments. The admissibility of high-tech audiovisual displays into evidence during trial is not at issue here. As long as the material represented is an accurate depiction of "what its proponent claims,"¹⁰ usually viewed in advance by the opposing party, the electronic display of audiovisual data may be admitted into evidence as informative, efficient, and illuminating.¹¹ Closing argument, however, requires closer examination. Scrutiny is most critical when physical evidence is scarce, circumstantial evidence is ambiguous, and the multimedia display is the primary tool for persuading the jury.¹² In *Skakel*, the individual images in the multimedia display had been admitted into evidence, but the images *in combination*—with each other and also with audiotape and text—had not.

allotted time discussing the statute of limitations issue and 10 minutes on discovery issues." The Supreme Court of Connecticut affirmed the trial court's judgment on January 24, 2006. *State v. Skakel*, No. 16844, 2006 WL 89928, at *1 (Conn. Jan. 24, 2006).

7. Brief of the Defendant-Appellant at 79, *State v. Skakel*, No. 16844, 2006 WL 89928 [hereinafter Appellant's Brief]. The defense also asserted other errors unrelated to this Note. *Id.* at 16–67. The State refuted appellant's arguments of prosecutorial misconduct, defending the use of the multimedia display as "appropriate and effective advocacy," although it never directly addressed the issue of the "passions, prejudices and emotions of the jury." Brief of the State of Connecticut/Appellee at 54–60, *State v. Skakel*, No. 16844, 2006 WL 89928 [hereinafter Appellee's Brief].

8. Elan E. Weinreb, Note, 'Counselor, Proceed With Caution': *The Use of Integrated Evidence Presentation Systems and Computer-Generated Evidence in the Courtroom*, 23 *CARDOZO L. REV.* 393, 396 (2001).

9. *E.g.*, Carney & Feigenson, *supra* note 4, at 22–35.

10. *FED. R. EVID.* 901(a).

11. See Eileen M. Siemek & Sandra K. Numedahl, *Automated Evidence Presentation Software: An Emerging Trend for the Courtroom—Part I*, *COLO. LAW.*, Dec. 1998, at 35, 36 (noting that the "[u]se of this technology allows all courtroom participants (judges, jury, counsel, etc.) . . . to view images concurrently and eliminates the need for time consuming individual examination of evidence." (omission in original) (quoting *THE FED. JUDICIARY, REPORT TO CONGRESS ON THE OPTIMAL UTILIZATION OF JUDICIAL RESOURCES* 67 (1998))).

12. See *infra* Part III.A (suggesting that the way products are marketed becomes most critical when substantive differences between them are negligible).

An attorney is allowed great creative leeway in closing argument.¹³ Although sophisticated, high-tech audiovisual displays support exceptional creativity, do these displays promote justice? They may not be just another kind of illustrative device in the progression of ever-more-sophisticated presentations; rather, the medium itself, *by design*, may intrude on the substance of the matter that is being conveyed—manipulating, more than informing, the perceptions of jurors.¹⁴

Part I of this Note provides an overview of the *Skakel* trial. Part II describes the defense's objections to the multimedia display used in the prosecution's closing argument. Part III surveys relevant principles of persuasive visual presentation as they relate to new technologies used in the legal context. A jury's ability to make informed, well-considered, and intelligent decisions is essential to our system of criminal justice; an understanding of how we make decisions—and what enhances, impedes, or distorts that process—is critical.¹⁵ Part IV discusses the traditional common-law rules of closing argument. Lastly, applying the relevant rules and principles, Part V addresses the legal propriety of the prosecution's multimedia closing argument in *Skakel*, and makes general suggestions as to what justice requires in multimedia presentations in closing argument.

I. BACKGROUND

A. *The Crime Charged*

All that is known for certain is that on the night of October 30, 1975, fifteen-year-old Martha Moxley was brutally beaten to death with a golf club on the property where she lived in Greenwich, Connecticut.¹⁶ There were no eyewitnesses, there was little physical evidence, and for twenty-

13. See *Carter v. Baham*, 683 So. 2d 299, 304 (La. Ct. App. 1996) (“Counsel may properly argue and comment on matters of general knowledge and folklore outside the record. In argument, counsel may use illustrations based upon personal experience and refer to history, religion, myth, and literature.”); see also BENNETT L. GERSHMAN, *PROSECUTORIAL MISCONDUCT* § 11:38 (2d ed. 2001) (“Courts ordinarily allow the prosecutor considerable leeway in moving about the courtroom and displaying tangible objects and demonstrative exhibits admitted in evidence.”).

14. See Jill Schachner Chanen, *Stay Tuned*, A.B.A. J., Oct. 2004, at 45, 46 (referring to “Marshall McLuhan’s famous observation,” and suggesting that “in law the medium not only is the message, it could be the winning argument”).

15. See *id.* at 56 (“For years law schools have preached the importance of visual storytelling But many law schools have bowed to the forces of Hollywood by teaching students media-related techniques that are more likely to mesmerize a jury or bored judge.”).

16. Lang, *supra* note 3, at 11–12. For detailed accounts of the crime and subsequent investigation—from vastly different perspectives—see generally MARK FUHRMAN, *MURDER IN GREENWICH: WHO KILLED MARTHA MOXLEY* (1999) and Kennedy, *supra* note 5.

five years no one was charged with the murder.¹⁷

At the time of Martha's death, the Skakel family lived diagonally across from the Moxleys and was known as the richest and most prominent family in Belle Haven.¹⁸ Rushton Skakel, the family patriarch, was the brother of Ethel Kennedy.¹⁹ Over the years the notion persisted that the connection with its famous relatives somehow protected the Skakel family from more thorough investigation;²⁰ however, "in the beginning, [this notion] probably sprang more from bias than fact."²¹ Ultimately (and ironically), what turned the attention of investigators to Michael Skakel²² was a series of articles that ran in *Newsday* in 1995, describing the findings of private investigators hired by the Skakels in an attempt to finally solve the crime and clear the family of any involvement.²³ The television program *Unsolved Mysteries* aired a segment about the Moxley murder based on those articles.²⁴ The broadcast led some viewers to call the station saying they had attended the Elan School with Skakel between 1978 and 1980.²⁵ Following a drunken driving incident, Michael Skakel had been sent to Elan, a residential school in Poland, Maine, for adolescents with emotional or behavioral problems.²⁶ Elan "practices a controversial behavior-modification program that relies on peer confrontation."²⁷ Remarks Skakel allegedly made to residents at Elan and subsequent audiotapes of Skakel recounting his story to a ghostwriter for a prospective autobiography would form the major part of the prosecution's case.²⁸

17. Leonard Levitt, *A Murder Charge 25 Years Later*, NEWSDAY, Jan. 20, 2000, at A6, available at 2000 WL 9993390. Early on, police focused on a number of possible suspects, and for years after, Michael Skakel's brother Tommy was "all but accused of the crime." Lang, *supra* note 3, at 13.

18. Lang, *supra* note 3, at 12.

19. *Id.*

20. *Id.* at 13.

21. *Id.* "The most definitive account of Martha's murder . . . brought to light virtually everything that is publicly known about the case. . . . It found no evidence of a coverup, but said police had delayed in searching the Skakel property. . . . 'There was no coverup; there was a screw-up . . .'" *Id.* at 15.

22. Michael Skakel was also fifteen years old at the time of the murder. Appellant's Brief, *supra* note 7, at 18. He was charged as a juvenile, but after a hearing on the matter, the case was transferred to the regular criminal docket. *Id.* at 18-19.

23. Levitt, *supra* note 17.

24. *Id.*

25. *Id.*

26. Kennedy, *supra* note 5, at 68; *Elan School*, <http://www.elanschool.com/about/index.html> (last visited Feb. 12, 2006).

27. Kennedy, *supra* note 5, at 68.

28. *Id.* at 74; *48 Hours Investigates: Ghosts of Greenwich Part III: Defense Seeks New Trial* (CBS television broadcast Sept. 10, 2003), available at <http://digbig.com/4gfxm> [hereinafter *Ghosts of Greenwich III*].

Twenty-five years after her death, in January 2000, the State of Connecticut charged Michael Skakel with the murder of Martha Moxley.²⁹

B. The Prosecution

At Skakel's trial, the State offered the testimony of former Elan residents as to statements Skakel allegedly made that were "either out-and-out confessions or at least incriminating admissions by him."³⁰ Those witnesses were unreliable; one witness, whose testimony had changed between his grand jury appearance and the preliminary hearing, "admitted that prior to facing the grand jury, he had taken 25 bags of heroin."³¹ Another witness, John Higgins, who knew Skakel from his time at the Elan School, testified that Skakel had admitted to the murder.³² But other witnesses testified to Higgins's "reputation for not being truthful," and that they had never heard Skakel confess to the killing.³³ Higgins himself later admitted to lying about hearing Skakel confess.³⁴

Ultimately, the prosecutor's use of Skakel's own words caused Skakel's undoing.³⁵ From the beginning, Michael Skakel had a strong alibi that had shielded him from suspicion for many years.³⁶ His alibi, which put him miles away from the crime scene watching television with his brothers and some friends in North Greenwich, was corroborated in 1975 by three witnesses, including his brother John.³⁷ John's testimony was polygraph certified.³⁸ Twenty-seven years later, however, testifying witnesses were less certain about Michael Skakel's exact whereabouts, and his own statements were seen to weaken the alibi "without demolishing it."³⁹ Those statements were passing remarks Skakel recorded in 1997 in contemplation of a proposed autobiography.⁴⁰ On the tape, Skakel described his house as

29. Levitt, *supra* note 17. Michael Skakel surrendered to Greenwich police following "a finding by Connecticut Judge George Thim that probable cause existed to arrest him for the Moxley murder. For the [previous] 18 months, Thim . . . served as a one-man grand jury, a procedure unique to the state that provides a court of last resort in unsolved cases." *Id.*

30. *Ghosts of Greenwich III*, *supra* note 28.

31. *Ghosts of Greenwich II*, *supra* note 4. The same witness, Greg Coleman, "died of a drug overdose just before the trial. But a tape of his previous testimony was played for the jury." *Id.*

32. Kennedy, *supra* note 5, at 70.

33. *Id.*; see also Appellant's Brief, *supra* note 7, at 22–28 (detailing alleged instances of brutal physical and emotional torture designed to elicit from Skakel a confession to the murder).

34. Kennedy, *supra* note 5, at 70.

35. *Ghosts of Greenwich III*, *supra* note 28.

36. Kennedy, *supra* note 5, at 54.

37. *Id.* at 52, 54.

38. *Id.* at 54.

39. *Id.* at 68; Grossman with Crittle, *supra* note 2, at 35.

40. *Ghosts of Greenwich II*, *supra* note 4; Grossman with Crittle, *supra* note 2, at 35.

he found it after returning with his brothers late in the evening: most of the lights were out; he went upstairs to his sister's room; her door was closed; and he remembered that her friend Andrea had gone home.⁴¹ Andrea Shakespeare, a friend of Skakel's sister, had visited the Skakel home earlier in the evening.⁴² She was taken home *after* the brothers left to drive their friend to North Greenwich.⁴³ The prosecution argued that if Skakel truly had been on the trip with his brothers, he could not have remembered that Andrea had gone home because he claimed to have left before her.⁴⁴

Additionally, the morning after her daughter had failed to return home, Mrs. Moxley appeared at the Skakel's front door asking, "Michael, have you seen Martha?"⁴⁵ Michael described his "panic[ked]" reaction to her question.⁴⁶ The prosecution used Skakel's own recorded words to imply that the only reason the defendant would have reacted to the question with such panic was that he was guilty of committing the murder.⁴⁷

C. The Defense

Michael Skakel did not testify at trial. His version of the events, as presented by the defense, placed him at a friend's house at the time Martha Moxley was killed.⁴⁸ In 1975, he also said that after he and his brothers returned home from his friend's house, he had gone right to bed; this, it turned out, had not been the truth. Fear of his "staunch Catholic" father had prevented him from telling investigators what really happened.⁴⁹ By 1993, however, Skakel had become a powerful athlete, sober for eleven years, and no longer afraid of his father.⁵⁰ Skakel then told the private investigators (hired by Rushton Skakel to clear the family name) the full story of his whereabouts that night.⁵¹ According to Skakel, after returning home after eleven o'clock that night, he had gone out again

41. Appellee's Brief, *supra* note 7, at 56.

42. Kennedy, *supra* note 5, at 52, 66.

43. *Id.* at 66.

44. Transcript of the Proceedings at 135–36, *State v. Skakel*, 31 Conn. L. Rptr. 125 (Conn. Super. Ct. Dec. 11, 2001) (No. FST CR00-135792T) [hereinafter Transcript of Closing Arguments].

45. *Id.* at 138.

46. *Id.*

47. *Ghosts of Greenwich III*, *supra* note 28.

48. Kennedy, *supra* note 5, at 54.

49. *Id.* at 62. "Michael sometimes slept in a closet to escape his father's wrath. When Michael was ten, [his father] Rushton had caught him looking at *Playboy* with his friends and knocked him silly. By age thirteen Michael was an alcoholic." *Id.*

50. *Id.*

51. *Id.* at 60, 62.

to peep through the window of a woman who was known to walk around her house scantily clad. Disappointed that her shades were drawn, he decided to go home. When he passed the Moxley house, Michael saw a light and climbed a tree next to a bedroom he thought was Martha's. He tossed pebbles to get her attention and called, "Martha, Martha," but there was no response. He made a halfhearted attempt to masturbate in the tree before becoming embarrassed and climbing down.⁵²

The prosecution attempted to discredit this story as a recent fabrication contrived after 1990 to account for the possible presence of any of Skakel's DNA near or on Moxley's body, suggesting that Skakel's "new" story stemmed from his fear that more sophisticated methods of DNA testing might reveal damning evidence that was not uncovered in 1975.⁵³ In fact, no semen was found at the scene, and, as the defense argued, Skakel had admitted the embarrassing masturbation story to a number of friends and relatives as early as 1979.⁵⁴ Furthermore, the tree in which Michael admitted to trying to masturbate was not the tree under which Moxley's body was found.⁵⁵

According to the defense, when Michael was describing his "feeling of panic" upon being awakened by Mrs. Moxley, he was referring to panic induced by the thought that someone had seen him masturbating the night before and not the panic induced by the thought of having committed the murder.⁵⁶

II. THE PROSECUTION'S CLOSING ARGUMENT

From the defense's perspective, "[t]he display superimposed Michael's statements, out of context, on gruesome pictures of Martha's slain body. . . . As the prosecution played the audiotape, Michael's words appeared on a giant screen, turning red and exploding in size."⁵⁷ From the prosecution's perspective, "using the interactive multimedia toolbox, [the prosecutor] did what lawyers are supposed to do in summation. He took different parts of the evidence, brought it all together and made you see it in a new way."⁵⁸

52. *Id.* at 62.

53. Transcript of Closing Arguments, *supra* note 44, at 139; Kennedy, *supra* note 5, at 65.

54. Transcript of Closing Arguments, *supra* note 44, at 87–89; Kennedy, *supra* note 5, at 65.

55. Kennedy, *supra* note 5, at 65.

56. *Ghosts of Greenwich III*, *supra* note 28.

57. Kennedy, *supra* note 5, at 74.

58. Carney & Feigenson, *supra* note 4, at 29 (quoting *American Morning with Paula Zahn*:

Up until the time the State offered its closing arguments to the jury, “both sides thought Michael might be acquitted.”⁵⁹ It was the State’s closing argument that made the difference.⁶⁰ “Orchestrating a barrage of tapes, photographs and flashing transcripts, [the prosecution] wove dozens of disparate facts into a simple scenario as chilling as any thriller”⁶¹ In the first part of its summation, the prosecution displayed twelve exhibits that had been entered into evidence at trial, each “correspond[ing] with the particular point the [S]tate’s attorney was making at the time.”⁶² These included pictures of Martha Moxley, alive and smiling, and also as a corpse; the home and landscaped grounds of the Moxleys; the tree underneath which the victim was found; and an overall plan of the crime scene.⁶³

After the defense’s traditional closing,⁶⁴ the prosecution proceeded with its rebuttal argument.⁶⁵ It is this rebuttal, in particular, that raises the issue of the propriety of allowing multimedia presentations in summation. After Skakel’s conviction, the defense characterized this part of the display as improper for distorting the meaning of the evidence and appealing to the passions and prejudices of the jury.⁶⁶ On appeal, the defense identified three problems related to the use of the multimedia presentation: improper manipulation of written text, intentionally misleading editing of audiotape,

Jurors Deliberate Skakel Case (CNN television broadcast June 4, 2002), available at <http://transcripts.cnn.com/TRANSCRIPTS/0206/04/ltm.11.html>).

59. *Ghosts of Greenwich III*, *supra* note 28. Shortly before the conclusion of the trial, the State “asked the judge to approve a request for a new charge that could have led to a conviction on the lesser charge of manslaughter.” Lindsay Faber, *Lesser Charge Considered, Withdrawn for Skakel*, GREENWICH TIME, May 31, 2002. The offer was withdrawn hours later upon consideration of issues related to grounds for appeal, but the initial request was seen as a sign of the weakness of the prosecution’s case. *Id.* The prosecution stated, “We originally filed it because we felt it was appropriate, and after examination, there are many potential appellate issues that could be raised” *Id.* Defense attorney Michael Sherman characterized the motion as “an ill-conceived, last-minute attempt to hedge their bet and canoodle a compromise verdict.” Leonard Levitt, *On Second Thought . . . / State Makes, then Rescinds, Bid for Skakel Manslaughter Option*, NEWSDAY, May 31, 2002, at A18, available at 2002 WL 2746136.

60. See Grossman with Crittle, *supra* note 2, at 35 (“It was Benedict’s summation that turned the tide.”); see also Rick Green & Jesse Leavenworth, *Lawyers Praise State’s Case*, HARTFORD COURANT, June 8, 2002, at A1 (“The confident hand of a veteran prosecutor, assisted by shrewd audiovisual theatrics, delivered the surprising Skakel guilty verdict . . .”).

61. Grossman with Crittle, *supra* note 2, at 35.

62. Appellee’s Brief, *supra* note 7, at 55.

63. *Id.*

64. Transcript of Closing Arguments, *supra* note 44, at 21–91. Near the outset of his presentation, defense attorney Michael Sherman made a point of alluding to the prosecution’s use of the high-tech presentation during the trial and in its closing argument: “The nature of our defense -- we didn’t have the high tech delivery. We’ve got two kind[s] of boards here.” *Id.* at 23.

65. *Id.* at 91.

66. Appellant’s Brief, *supra* note 7, at 79.

and unfairly prejudicial juxtaposition of words and images.⁶⁷

A. *Manipulation of Written Text*

On appeal, the defense objected to the State's projection of Skakel's words during the prosecution's rebuttal argument.⁶⁸ The intention of the prosecution was to call the attention of jurors to an inconsistency in Skakel's story and cause them to infer that his lying about his alibi for that evening was proof that he committed the murder. Martha Moxley was last seen alive with Michael's older brother Tommy in the Skakel driveway at 9:30 on the evening of October 30, 1975, just before she left to go home.⁶⁹ A forensic expert established the time of her death at "somewhere between 9:30 and 10 o'clock."⁷⁰ In 1975, it was confirmed that at about the same time that night, a number of Skakel siblings drove a visiting friend to his home about eight miles away, where they spent the evening watching *Monty Python's Flying Circus*.⁷¹ The police established then, and the defense asserted at trial, that Michael Skakel was part of that group.⁷² Skakel's alibi was undisputed and "airtight" up until the time of his trial.⁷³

Andrea Shakespeare was at the Skakel house on the night of the murder.⁷⁴ She testified that before she was driven home by Michael's sister—but *after* the Skakel car left for North Greenwich—she was "under the impression" that Michael was still in the house.⁷⁵ She stated that she did not actually see who was in the car, did not see the car leave, and did not see Michael Skakel in the house after the car left.⁷⁶ Although her testimony cast doubt on Skakel's alibi, it was too vague and uncertain to be

67. *Id.* at 77–79.

68. *Id.*

69. Kennedy, *supra* note 5, at 52; *48 Hours Investigates: Exclusive: Ghosts of Greenwich* (CBS television broadcast Sept. 10, 2003), available at <http://digbig.com/4ggek> [hereinafter *Ghosts of Greenwich I*].

70. *Ghosts of Greenwich I*, *supra* note 69.

71. Kennedy, *supra* note 5, at 52, 54; *Ghosts of Greenwich I*, *supra* note 69.

72. Kennedy, *supra* note 5, at 52; *Ghosts of Greenwich I*, *supra* note 69. His brother John's testimony about Michael's whereabouts was polygraph certified but inadmissible in court. Kennedy, *supra* note 5, at 54; *Ghosts of Greenwich II*, *supra* note 4. When the family initiated their own investigation in 1976 to finally determine whether any of the Skakels could have been involved in the murder, all the children were administered sodium-pentothal tests. Kennedy, *supra* note 5, at 53. Additionally, even though he was not a suspect at the time, Michael also submitted to questioning under the influence of sodium pentothal in 1980 and two more times in the early 1990s. *Id.* at 53–54. Each time, "psychiatrists concluded that he had not committed the crime." *Id.* at 54.

73. Kennedy, *supra* note 5, at 54; *Ghosts of Greenwich II*, *supra* note 4.

74. Kennedy, *supra* note 5, at 66.

75. *Id.* (internal quotation marks omitted).

76. Transcript of Closing Arguments, *supra* note 44, at 57–59.

dispositive.⁷⁷

In 1997, during an audiotaped interview for his proposed autobiography, Michael Skakel described the house he returned to later that evening. In the State's rebuttal closing, jurors heard Skakel's voice as his words were projected on a large screen: "I got home and most of the lights were out. I was walking around the house, nobody was on the porch, went upstairs, my sister's room, her door was closed, and I remember that and Andrea had gone home."⁷⁸ At trial those words still might have been open to different interpretations, but the prosecution seized on them in the second phase of its closing to claim Skakel's alibi as an outright lie.⁷⁹

The inference the jury was expected to make was that if Skakel specifically could recall seeing Andrea go home, then he could *not* have been on the "Mont[y] Python tour," which had served as his alibi for so many years.⁸⁰ Projected on the large courtroom screen during rebuttal, the words, "and I remember that Andrea had gone home," were much larger than the rest and appeared in red.⁸¹

B. Selective Editing of Audiotape

As described,⁸² while initially telling police that he had gone right to bed upon returning home after 11 o'clock on the night of the murder, Skakel later admitted the embarrassing story of climbing a tree in front of the Moxley house where he attempted to masturbate.⁸³ During the trial, the entire thirty-two-minute audiotape of Skakel's interview with his biographer was played for the jury.⁸⁴ Skakel is heard recounting this incident: "I'm a little out of my mind, because I was drunk and high, I pulled my pants down, I masturbated for 30 seconds in the tree, and I went 'This is crazy.' If they catch me, they're gonna think I'm nuts."⁸⁵ He continues: "And then I was like 'I'm running home,' I ran home, and I remember thinking 'Oh my God. I hope to God nobody saw me jerking

77. *Id.*; Kennedy, *supra* note 5, at 66.

78. Transcript of Closing Arguments, *supra* note 44, at 135.

79. *Id.* at 135-36.

80. *Id.* at 136.

81. Appellee's Brief, *supra* note 7, at 56.

82. See *supra* Part I.C (discussing Skakel's description of his actions after he returned home from watching television at a friend's house on the night of the murder).

83. Kennedy, *supra* note 5, at 62.

84. Appellee's Brief, *supra* note 7, at 55.

85. E-mail from Hope C. Seeley, attorney for the Appellant, to author (Feb. 20, 2005, 16:10 EST) (Ms. Seeley's notes for her oral argument before the Supreme Court of Connecticut) (on file with the *Vermont Law Review*).

off.”⁸⁶

The State did not include any of this part of the taped interview in its closing.⁸⁷ Instead, in summation, the State played the taped segments that immediately followed, those that described his being woken up by Mrs. Moxley asking him if he had seen Martha:

[A]nd I woke up to Mrs. Moxley saying, “Michael, have you seen Martha[?]” I am like “what[?]” [A]nd I was like still high from the night before, a little drunk and I was like “what[?]” I was like “oh, my God, did they see me last night[?]” And I am like, “I don’t know,” I am like and I remember just having the feeling of panic like “oh shit,” you know, like my worry of what I went to bed with, I don’t know, you know what I mean, I had a feeling of panic.⁸⁸

In what the defense has described as the “coup-de-grace of [the prosecution’s] improper closing argument,” the prosecution made it seem like Skakel was confessing to murder by “playing an edited audiotape of defendant’s admission of ‘guilt’ — *about a different event*.”⁸⁹ The recording that had been entered into evidence during the trial, in contrast, *did* contain the critical words that, at least according to the defense, clarified the specific wrong to which Skakel was “confessing.”⁹⁰

C. Juxtaposition of Words and Images

In the first part of the State’s argument, and again in its rebuttal, the prosecutor insinuated that Skakel had masturbated on Martha’s dead body.⁹¹ He described how “the killer had . . . tried to pry [Moxley’s] legs open after her body was dumped underneath a pine tree on her family’s estate.”⁹² As he spoke, the jury saw a closeup of the dead girl’s bare thighs. “This is where this photo acquires great significance That’s not a

86. Appellant’s Brief, *supra* note 7, at 78 n.80.

87. *Id.*

88. Transcript of Closing Arguments, *supra* note 44, at 138 (internal quotation marks added).

89. Appellant’s Brief, *supra* note 7, at 77–78. Objective accounts of the prosecution’s rebuttal closing seemed to recognize the problem with the edited audiotape: “[The prosecutor] played a critical passage from Michael’s own book proposal to sum up his case. But the passage he used was edited in such a way that what the jury heard appeared to be a confession to murder.” *Ghosts of Greenwich III*, *supra* note 28.

90. Carney & Feigenson, *supra* note 4, at 28; see *Ghosts of Greenwich III*, *supra* note 28 (describing the critical words left out by the prosecution during its multimedia presentation).

91. Transcript of Closing Arguments, *supra* note 44, at 17–18, 121.

92. Springer, *supra* note 4.

bruise. . . . Rather, it's a smear *This is evidence* that somewhere in the bloody assault scene . . . he administered the ultimate and sickest of humiliations"⁹³ In fact, "no semen was found on Martha and an autopsy determined she had not been sexually assaulted."⁹⁴ The juxtaposition of the disturbing and gruesome image with the State's insinuation that Skakel had masturbated on the victim's body left the jury with an image that "would ensure passionate outrage."⁹⁵

Additionally, as the prosecutor set the scene for the jury by means of a series of projected images of the Moxley home and its grounds, he carefully explained the presence of a number of surrounding trees.⁹⁶ Although at trial there was considerable inconsistency among witnesses about exactly which window of the house Skakel had tried to peer into, there was general agreement that he had climbed a tree to try to see into the Moxley house.⁹⁷ The prosecutor acknowledged that only two of the trees referred to in connection with Skakel's masturbation story afforded a view into the Moxley house.⁹⁸ He then referred to a third tree, one that was too far away to offer a view into the house.⁹⁹ The body was found under this "third" tree, a large pine.¹⁰⁰ Referring to *this* tree at the beginning of his argument, the prosecutor stated, "It is certainly climbable but that's not the point."¹⁰¹ The prosecutor's point was that it was a place "where a body could be hidden, . . . the place where . . . Michael Skakel dragged the body of Martha Moxley."¹⁰² Nevertheless, moments later and again in its rebuttal argument, the State made a point of connecting Skakel's masturbation story with the projected images of Martha Moxley's naked corpse lying beneath the large pine tree.¹⁰³

Finally, in the last moments of its summation, the State played Skakel's taped "confession"—omitting his reference to "jerking off"—juxtaposed and synchronized with photographs and text.¹⁰⁴ The State visually connected gruesome photographs of the victim with the words spoken by Skakel; "[e]ach time Michael said the word 'panic,' the display flashed a

93. Transcript of Closing Arguments, *supra* note 44, at 11–12 (emphasis added).

94. Springer, *supra* note 4.

95. Appellant's Brief, *supra* note 7, at 76.

96. Transcript of Closing Arguments, *supra* note 44, at 7–8.

97. *See id.* at 87–88, 117 (describing witness testimony placing Skakel in a tree outside the Moxley house).

98. *See id.* at 7 (describing the trees that offer a view into the Moxley house).

99. *Id.* at 8, 88.

100. *Id.* at 8.

101. *Id.*

102. *Id.*

103. *Id.* at 17–18, 121.

104. *Ghosts of Greenwich III*, *supra* note 28.

crime-scene photo of Martha's body."¹⁰⁵ Specifically, the photo of a smiling Martha Moxley dissolved into a photograph of the victim lying dead and naked on the ground.¹⁰⁶ According to legal analyst Jeffrey Toobin, the effect was "haunting."¹⁰⁷

III. PRINCIPLES OF PERSUASIVE VISUAL PRESENTATION

A. Introduction

In 1957, Vance Packard's *The Hidden Persuaders* was published—one of the earliest modern attempts to chronicle "the large-scale efforts being made . . . to channel our unthinking habits, our purchasing decisions, and our thought processes by the use of insights gleaned from psychiatry and the social sciences."¹⁰⁸ The book describes the advent of various methods of persuasion—some more, some less obvious—that were the advertising industry's responses to the "urgently felt need to 'stimulate' people" into buying goods they did not even know they needed.¹⁰⁹ One of the dilemmas that was "forcing marketers to search for more powerful tools of persuasion was the growing sameness of their products."¹¹⁰ One advertising agency president commented on the matter:

"I am astonished to find how many advertising men . . . believe that women can be persuaded by logic and argument to buy one brand in preference to another, even when the two brands concerned are technically identical. . . . The greater the similarity between products, the less part reason really plays in brand selection."¹¹¹

Comparing the persuasive functions of lawyers at trial with those of Madison Avenue salespeople may seem offensive. The analogy, however, is not inapt: where the evidence is circumstantial and sparse—when a case

105. Kennedy, *supra* note 5, at 74; Appellant's Brief, *supra* note 7, at 78.

106. Carney & Feigenson, *supra* note 4, at 28.

107. *CNN Newsnight* (CNN television broadcast June 3, 2002), available at <http://transcripts.cnn.com/TRANSCRIPTS/0206/03/asb.00.html>. Jeffrey Toobin is a legal analyst for the CNN News Group and has been a staff writer covering legal affairs for *The New Yorker* since 1993. On CNN TV: Anchors and Reporters, http://www.cnn.com/CNN/anchors_reporters/toobin.jeffrey.html (last visited Dec. 16, 2005).

108. VANCE PACKARD, *THE HIDDEN PERSUADERS* 1 (1957).

109. *Id.* at 15–16.

110. *Id.* at 16.

111. *Id.* at 17 (second omission in original).

is “close”—it is the way that each lawyer frames the issue and tells his version of events that becomes critically important. Closing argument is where attorneys may exercise their powers of persuasion most freely; objections to opponents’ closing arguments are rarely made and rarely sustained.¹¹² The question that ultimately needs to be addressed is whether multimedia displays in closing argument are inherently unfair, that is whether they carry a greater potential for unfairness than more traditional presentations. Although a comprehensive examination of the science of visual perception, cognition, and decision making is beyond the scope of this Note, several concepts are worthy of consideration, as they relate directly to multimedia presentations.

B. Layering and Masking

Edward Tufte’s treatise, *Envisioning Information*, examines the problem of rendering complex, multidimensional data onto paper and computer screens.¹¹³

Effective layering of information is often difficult; for every excellent performance, a hundred clunky spectacles arise. An omnipresent, yet subtle, design issue is involved: the various elements collected together on flatland¹¹⁴ interact, creating non-information patterns and texture simply through their combined presence. Josef Albers described this visual effect as $1 + 1 = 3$ or more, when two elements show themselves along with assorted incidental by-products of their partnership—occasionally a basis for pleasing aesthetic effects but always a continuing danger to data exhibits.¹¹⁵

112. See *infra* text accompanying note 141.

113. EDWARD R. TUFTE, ENVISIONING INFORMATION 9 (1990). Edward Tufte “writes, designs, and self-publishes his books on information design, which have received more than 40 awards for content and design. He is Professor Emeritus at Yale University, where he taught courses in statistical evidence, information design, and interface design.” The Work of Edward Tufte and Graphics Press, <http://www.edwardtufte.com/tufte> (last visited Feb. 1, 2006).

114. “Flatland” refers to the limitation of two-dimensional surfaces such as paper and video screens. TUFTE, ENVISIONING INFORMATION, *supra* note 113, at 12. “The idea of ‘flatland’ is based on the classic by A. Square. . . .” *Id.* at 12 n.1 (citing A. Square [Edwin A. Abbot], FLATLAND: A ROMANCE OF MANY DIMENSIONS (London, Seeley 1884)).

115. *Id.* at 53 (citing JOSEF ALBERS, *One Plus One Equals Three or More: Factual Facts and Actual Facts*, in SEARCH VERSUS RE-SEARCH 17–18 (1969)). It should be noted that Tufte’s work deals broadly with data design in general, and does not specifically address the transmission of information in the legal context. However, as the text points out, “[t]he principles of information design are universal—like mathematics—and are not tied to unique features of a particular language or culture.” *Id.* at 10.

In a second treatise, Tufte examines the critical implications of the form and substance of visual presentations on decision makers. By analyzing problems that approached visual presentation in significantly different ways, the author persuasively demonstrates that the quality of the methods used in displaying and interpreting evidence may have critical consequences.¹¹⁶ Two case studies of visual evidence used to reach critical decisions illustrate this theory: first, a graphic analysis of the cholera epidemic in London in 1854 that led to the discovery of its source, and thus brought it to an end; and second, the visual evidence that led to the wrong decision to launch the space shuttle Challenger in January 1986.¹¹⁷

By creating . . . graphics that revealed the data, Dr. John Snow was able to discover the cause of the [cholera] epidemic and bring it to an end. In contrast, by fooling around with displays that obscured the data, those who decided to launch the space shuttle got it wrong, terribly wrong.¹¹⁸

The technology available for integrated evidence presentation systems allows for ever more complex and sophisticated layering of information and the possibility for equally sophisticated techniques of revealing and obscuring evidence. The manipulation of layers of information inherently carries with it dangers to critical thinking and rational decision making:

We must come to realize not only the inherent power of the image itself, but also how the simple juxtaposition of one image next to another can affect our thinking and feeling in radical ways, and how in rapid succession images can ultimately form convincing arguments which, when received and believed, can . . . even topple governments. We must develop a critical understanding of how media can and does manipulate images to affect thought and emotion . . .¹¹⁹

Closely related to the method of layering is the concept of masking. Masking is the technique of calling attention away from one element, “called the target,” by overlapping it “spatiotemporally” with a second

116. EDWARD R. TUFTE, *VISUAL EXPLANATIONS: IMAGES AND QUANTITIES, EVIDENCE AND NARRATIVE* 27–53 (1997) [hereinafter TUFTE, *VISUAL EXPLANATIONS*].

117. *Id.* at 27.

118. *Id.* (emphasis added).

119. ANN MARIE SEWARD BARRY, *VISUAL INTELLIGENCE: PERCEPTION, IMAGE, AND MANIPULATION IN VISUAL COMMUNICATION* 333 (1997).

element, “called the mask.”¹²⁰ This technique is essential to magicians. “[T]he techniques of conjuring are especially relevant to theories of information display. To create illusions is to engage in *disinformation design*, to corrupt optical information, to deceive the audience.”¹²¹ Lawyers, like “[m]agicians . . . [and] other . . . performers, are professionals in communicating and presenting information. . . . Thus the strategies of magic suggest *what not to do* if our goal is truth-telling rather than illusion-making.”¹²²

C. Parallelism

Parallelism is another concept related to cognition and relevant to the discussion of multimedia displays. The second definition of the term “parallelism” in the *Oxford English Dictionary* explains its figurative sense: “close agreement of course or tendency; similarity in details; precise correspondence or analogy.”¹²³

In writing, parallelism may be employed to enforce connections between two or more concepts with “clarity, efficiency, forcefulness, rhythm, [and] balance.”¹²⁴ Richard Altick, in his *Preface to Critical Reading*, demonstrates parallel structure as he explains it: “The matching of phrase against phrase, clause against clause, lends an unmistakable eloquence to prose.”¹²⁵ An examination of analogous principles in two and three dimensions—“strategies of *visual parallelism*”¹²⁶—is relevant to an inquiry into the propriety of multimedia displays in closing argument.

Similar to the patterning of words and concepts in literature, visual elements may be associated and connected in patterns.¹²⁷ “Connections are built among images by position, orientation, overlap, synchronization, and similarities in content. . . . [T]he perceiving mind itself actively works to detect and indeed to generate links, clusters, and matches among assorted visual elements.”¹²⁸ Multiple images presented in parallel engender and enforce strong visual associations.¹²⁹ Conversely, “faulty parallelism”—drawing implicit or explicit connections between unlike elements—can lead

120. TUFTE, VISUAL EXPLANATIONS, *supra* note 116, at 64.

121. *Id.* at 55.

122. *Id.*

123. XI THE OXFORD ENGLISH DICTIONARY 195 (J.A. Simpson & E.S.C. Weiner eds., 2d ed. 1989).

124. TUFTE, VISUAL EXPLANATIONS, *supra* note 116, at 79.

125. *Id.* (quoting RICHARD D. ALTICK, PREFACE TO CRITICAL READING 210 (4th ed. 1960)).

126. *Id.*

127. *Id.* at 82.

128. *Id.*

129. *Id.* at 83.

to confusion, distortion, and false conclusions.¹³⁰ In advertising, examples of visual parallelism abound. There is a reason why beer commercials do not feature company executives holding up one placard at a time while discussing the virtues of their products point by point. The more effective—though perhaps less trustworthy—presentations feature images of beautiful, healthy, happy people enjoying life; these images are juxtaposed against and integrated with the advertiser’s product, leaving it to the viewer to infer the connection between beer, beauty, and happiness.

Analogies and associations have always been tools of the legal advocate. However, multimedia presentations in closing arguments complicate the fact-finder’s already formidable job of drawing accurate conclusions from inferences. Human beings are predisposed to seeing patterns and “deriving meaning out of essentially separate and disparate elements.”¹³¹ This predisposition, however, leaves us vulnerable to “perceptual filling-in and smearing” of information.¹³² Our judgment can easily be tricked into creating complete pictures in our minds that do not exist in reality.¹³³ The means by which we can fool ourselves—or be fooled—include “resolution of ambiguities, which can be interpreted in more than one way; paradoxes which seem to show the impossible, pitting appearance against knowledge; and distortions, which rely on perceptual biases to confuse cognitive thinking.”¹³⁴

It is essential, therefore, that elements overlapped and juxtaposed for the first time in closing argument present an honest and accurate basis upon which a jury may make an intelligent decision, and to which counsel may make intelligent objections. Given the inherent perceptual vulnerabilities in our processing of information, it becomes critically important in the legal context that the propriety of complex, multimedia presentations in closing argument be scrutinized carefully.

IV. GENERAL RULES OF CLOSING ARGUMENT

Generally, closing argument is where an attorney is free to review the evidence and “to explicate those inferences which may reasonably be drawn from the evidence.”¹³⁵ As a threshold rule, physical evidence used in

130. *See id.* at 102–103 (providing examples of faulty parallelisms). “[T]heir passages of apparent analogy are but false parallelisms” 2 JAMES MARTINEAU, *ESSAYS, PHILOSOPHICAL AND THEOLOGICAL* 312 (Boston, William V. Spencer 1868).

131. BARRY, *supra* note 119, at 27.

132. *Id.* at 26.

133. *Id.* at 27.

134. *Id.*

135. *Bertolotti v. State*, 476 So. 2d 130, 134 (Fla. 1985).

closing argument must have been admitted into the record at trial.¹³⁶ “Closing arguments are the chronological and psychological culmination of a jury trial.”¹³⁷ On the other hand, it is improper “to inflame the minds and passions of the jurors so that their verdict reflects an emotional response to the crime or the defendant rather than the logical analysis of the evidence in light of the applicable law.”¹³⁸

Courts ordinarily give attorneys great leeway to present their best case in a light most favorable to their clients.¹³⁹

The purpose of closing argument is to draw together all of the facts and to present the theory of the case so that a fact finder may render a correct verdict. Counsel has wide latitude to fully discuss the evidence that was presented in the case, which includes any inferences, deductions, or analogies that may be reasonably drawn from the evidence even when the evidence itself is unreasonable.¹⁴⁰

Reversals for improper closing arguments are rare, and unless objections are preserved at trial, almost nonexistent.¹⁴¹ Objection to the prosecutor’s closing argument in *Skakel*, one of seven issues on appeal, was in fact *not* preserved at trial.¹⁴² This does not affect, however, the inquiry into the general propriety of such presentations. Unlike admitted evidence, opposing counsel’s closing argument is not viewed in advance.¹⁴³ Moreover, it is the very nature of the medium—a multilayered, multimedia display—that makes it extremely difficult for opposing counsel to “timely

136. PETER C. LAGARIAS, EFFECTIVE CLOSING ARGUMENT § 1.19 (2d ed. 1999). There are exceptions to the rule that demonstrative aids used in closing argument must have been properly admitted earlier in the trial. 6 AM. JUR. TRIALS § 46 (1967). For example, charts and diagrams “that are designed to simplify or summarize complicated evidence,” may be allowed at the discretion of the court. *Id.* However, “charts and other aids . . . generally may not be used later in chambers during jury deliberations.” LAGARIAS, *supra*, § 1.19.

137. THOMAS A. MAUET, TRIAL TECHNIQUES § 9.1 (6th ed. 2002).

138. *Bertolotti*, 476 So. 2d at 134.

139. *See* *Carter v. Baham*, 683 So. 2d 299, 304 (La. Ct. App. 1996) (describing how counsel may discuss matters outside the record, such as matters of general knowledge and personal experience).

140. *Id.* at 303.

141. LAGARIAS, *supra* note 136, § 1.21; *see also* 2 F. LEE BAILEY & KENNETH J. FISHMAN, CRIMINAL TRIAL TECHNIQUES § 51:2 (2002) (“Be sure to register your objection to any prejudicial or inflammatory remark . . . If you fail to object, you will be precluded from raising that point as error on appeal, except in those rare situations where the court raises the issue sua sponte.”).

142. Appellant’s Brief, *supra* note 7, at 68.

143. This was, in fact, the case in the *Skakel* trial. Although elements of all the displays used in closing, e.g., the images and the audiotape, had been admitted into evidence and shown to defense attorneys beforehand, “[t]he uses of those elements in the closing argument . . . were not disclosed, in order to protect the attorneys’ work product.” Carney & Feigenson, *supra* note 4, at 31.

object” with specificity to what is being flashed before him for the first time in closing argument. In 1965, a California District Court of Appeals stated, “[t]here can be no detailed handbook rules with respect to these matters. Everyone, including the trial judge, knows the limits beyond which a lawyer should not trespass.”¹⁴⁴ While that conclusion may be arguable, experience shows that these limits are not universally known, or followed.

The prosecution’s closing argument in *Skakel* presents two issues that have been reviewed by the courts: improper use of demonstrative evidence during closing argument and improper emotional appeals to the jury.

A. *Improper Use of Demonstrative Evidence in Closing Argument*

Because the technology has only recently evolved, few cases have addressed the kind of high-tech display that the State employed during its summation in the *Skakel* case.¹⁴⁵ Even the president of the visual communications company that designed the interactive¹⁴⁶ program recognized that the prosecution had “something unusual going for it.”¹⁴⁷ He further observed that this particular type of visual persuasion “could very well presage the trial advocacy of the future.”¹⁴⁸ Although this software promoter may not be a wholly objective observer, it is difficult to argue with his observation in light of the appearance of ever more sophisticated presentations. Because so few cases specifically address the closing argument issues that high-tech displays raise, one is left to explore the existing body of case law that addresses the proper scope and use of demonstrative evidence in closing arguments.

Closing arguments have always served to collect and synthesize evidence that the jury has seen and heard before. Whether accompanied by visual aids or not, traditional summations, however, are simple when

144. *People v. Polite*, 45 Cal. Rptr. 845, 850 (Cal. Dist. Ct. App. 1965).

145. The *Federal Rules of Evidence*, similarly, are of limited assistance, because they were promulgated long before the advent of most of the current technology. Of some help, by analogy, may be Rule 401, which governs admissibility of “relevant evidence.” FED. R. EVID. 401. To be admissible, evidence must be relevant to a “fact that is of consequence to the determination of the action.” *Id.* Relevant evidence may be excluded at the discretion of the court “if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury.” FED. R. EVID. 403. The threshold question with regard to the use of any physical evidence, including demonstrative evidence, in closing argument is that the evidence has to have been properly admitted at trial. *United States v. Ojala*, 544 F.2d 940, 946 (8th Cir. 1976). “The closing arguments of counsel are, of course, limited to the facts in evidence and reasonable inferences flowing therefrom.” *Id.*

146. The term “interactive” in the context of multimedia presentations does not refer to any sort of viewer participation, but rather the interaction between the speaking advocate (or an assistant) and the material that is being projected.

147. *Carney & Feigenson*, *supra* note 4, at 22–23.

148. *Id.* at 23.

compared to multimedia presentations. With their ability to simultaneously juxtapose images, text, and sound, such presentations amount to more than the sum of their parts. Precedent cases suggest limitations on the use of comparable, albeit less sophisticated, material in closing arguments.

In 1995, the Eighth Circuit Court of Appeals, in *United States v. Crockett*, addressed at some length the issue of visual aids in summary argument.¹⁴⁹ Its analysis may serve as a guidepost for evaluating evidence of a similar, if not identical, nature.¹⁵⁰ The *Crockett* court stated that visual aids used as a device to help a jury organize complex material are generally admissible “pedagogic devices” and “need not be admitted into evidence, and therefore can be created by counsel for or during closing argument.”¹⁵¹ The court hastened to acknowledge, however, that “there are limits to the use of such devices.”¹⁵² It analogized the use of “technologically more advanced” material (in that case, projected transparencies) with a lawyer’s summary of witness testimony on a blackboard.¹⁵³ The court conceded that not all trial judges would agree and that some would disallow the use of such material because it is “too distracting or too influential.”¹⁵⁴ The decision is at the court’s discretion, and “virtually unreviewable on appeal.”¹⁵⁵

The *Crockett* court also discussed whether prosecutors must give defense counsel advance notice of the intended use of visual devices during closing argument, helpfully citing a legal treatise that suggests just that.¹⁵⁶ Finally, the court acknowledged that there are “substantive limits on the use of such pedagogic visual aids.”¹⁵⁷ The standard is whether the material presented “was so unfair and misleading as to require a reversal.”¹⁵⁸

In *People v. Ammons*, the Appellate Court of Illinois found reversible error where the trial judge permitted an audiotape of the defendant’s statement to police to be played during the State’s rebuttal closing argument.¹⁵⁹ The court held that “[a]llowing such evidence to be

149. *United States v. Crockett*, 49 F.3d 1357, 1360–61 (8th Cir. 1995).

150. *Id.*

151. *Id.* at 1360–61.

152. *Id.* at 1361.

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.* (citing 5 JACK B. WEINSTEIN ET AL., WEINSTEIN’S EVIDENCE ¶ 1006[07], at 1006-24 (1994) (suggesting that the use of visual aids in closing argument should be limited to those “shown to opposing counsel” and approved in advance of trial)).

157. *Crockett*, 49 F.3d at 1361.

158. *Id.* (quoting *United States v. Possick* 849 F.2d 332, 339 (8th Cir. 1998)).

159. *People v. Ammons*, 622 N.E.2d 58, 60 (Ill. App. Ct. 1993).

reintroduced dramatically overemphasized its credibility.”¹⁶⁰ A jury must consider the totality of all the evidence presented during trial, “free of the overemphasis given any portion of it by verbatim repetition during the trial’s waning moments.”¹⁶¹

In *State v. Muhammad*, the Superior Court of New Jersey reviewed the decision of a lower court that routinely used videotape as the official trial record.¹⁶² During its closing argument, over defense counsel’s objection, the prosecution was permitted to play back portions of the videotaped testimony of five State witnesses.¹⁶³ On appeal from his conviction, the defendant argued that “allowing the prosecutor to present the jury with a ‘repeat performance’ of witness testimony” is like allowing witnesses to testify a second time, thereby giving the testimony “undue emphasis.”¹⁶⁴ Although the appellate court affirmed the lower court’s decision, it noted that “[t]he limited use of video replays may serve as an incidental aid [in closing argument]. But the misuse or over-use of this technique might tend to usurp the jury’s function and improperly divert the jury from its role.”¹⁶⁵

B. Improper Emotional Appeals to the Jury

Cases that have dealt with improper prosecutorial appeals to emotions during closing argument reveal that courts generally look at the intent and willfulness of counsel as an indicator of impropriety.¹⁶⁶ Citing the prosecutor’s “over-exuberance in [his] closing argument in exhibiting the picture of the [victim’s] dead body,” the Supreme Court of Indiana found reversible error because of the tendency of the photograph to unfairly prejudice the jury.¹⁶⁷

Similarly, the Supreme Court of Mississippi found reversible error where slides of the victim’s body were shown during closing argument at trial and in the sentencing proceeding.¹⁶⁸ The general rule in the jurisdiction was that photographs of victims’ bodies may be admitted “where they have probative value, and where they are not so gruesome as to

160. *Id.*

161. *Id.*

162. *State v. Muhammad*, 820 A.2d 70, 76 (N.J. Super. Ct. App. Div. 2003).

163. *Id.*

164. *Id.* at 80.

165. *Id.* at 82, 87.

166. *E.g.*, *Tingley v. Times Mirror Co.*, 89 P. 1097, 1106 (Cal. 1907) (“It is only when the conduct of counsel consists of a willful or persistent effort to place before a jury clearly incompetent evidence . . . that prejudicial error is committed.”).

167. *Adler v. State*, 225 N.E.2d 171, 174 (Ind. 1967).

168. *Stringer v. State*, 500 So. 2d 928, 934, 946 (Miss. 1986).

be overly prejudicial and inflammatory.”¹⁶⁹ The court, however, drew a distinction between presentation of such evidence during the trial and its presentation as part of closing argument: citing *State v. Clawson*, the Mississippi court noted that “where such photographs are shown to the jury during closing argument, ‘their impact on the jury is such that it will become so incensed and inflamed at the horrible conditions depicted that it will not be able to objectively decide the issue of the defendant’s guilt.’”¹⁷⁰ The court concluded: “We deplore this practice. As the West Virginia court noted in *Clawson*, the effect is to take the pictures far beyond their evidentiary value and use them as a tool to inflame the jury.”¹⁷¹

While these examples address the underlying issues raised in *Skakel*, they do not address the additional complications that multimedia displays present—that the very form of the presentation itself is specifically designed with the objective of unfairly appealing to the non-rational portion of the mind. Although it is disturbing to contemplate that an individual’s liberty interest may be at stake without being subjected to a “logical analysis of the evidence in light of the applicable law,”¹⁷² the concept is certainly not new as it relates to commercial and political advertising.¹⁷³ The persuasive approach of commercial advertising has not been the traditional approach of the persuasive legal advocate. However, multimedia presentations in closing arguments may bring the courtroom trial uncomfortably close to the machinations of Madison Avenue.

V. THE LEGAL PROPRIETY OF THE PROSECUTION’S CLOSING ARGUMENT IN *SKAKEL*

It is difficult to find fault with at least some aspects of trial-presentation technology. Trial-presentation technology allows for the storage and display of images that have been scanned and digitized.¹⁷⁴ Graphic images can easily be retrieved and displayed without the need to distribute individual copies to the judge, opposing counsel, and each individual juror.¹⁷⁵

169. *Id.* at 934.

170. *Id.* (quoting *State v. Clawson*, 270 S.E.2d 659, 674 (W. Va. 1980)).

171. *Id.* at 935.

172. *Bertolotti v. State*, 476 So. 2d 130, 134 (Fla. 1985).

173. *See supra* Part III.A (discussing the persuasive methods of the advertising industry).

174. Dennis M. Kennedy, *Bringing Presentation Technology into the Courtroom*, RES GESTAE, July 1999, at 11, 11 (1999).

175. *Id.*

When limited to these uses, the new technology is merely a benign extension of less-sophisticated, traditional methods of presenting evidence. Advocates for integrated evidence presentation systems emphasize four advantages that such displays have over the more traditional methods: (1) computer displays make it easier for jurors to see and study exhibits; (2) they allow an attorney to focus the attention of the judge and jury on the relevant language of any exhibit; (3) they speed-up the presentation of evidence; and (4) they may greatly enhance the impact of documentary evidence.¹⁷⁶

Of concern, however, is that “[t]echnology may well be not just an advantage, but a deciding factor.”¹⁷⁷ The issues posed by the new technology stem from the nature of the medium itself. Whether or not the content of any particular high-tech multimedia presentation is unfair and misleading requires individual analysis. Of particular concern is whether the form of the presentation itself might tend to mislead the jury and distort the facts. Whether or not Michael Skakel killed Martha Moxley is irrelevant to the general inquiry. The question is whether he was convicted on the basis of improper argument as presented in a form all too familiar in popular culture but previously untested in the legal setting.

The creator of the *Skakel* multimedia display contends that the prosecution’s presentation would not have differed substantively had the prosecutor placed enlarged photographs mounted on poster board before the jury.¹⁷⁸ “The only difference is that the interactive multimedia system allowed [the prosecutor] to juxtapose words and images more smoothly, preventing the jurors from being distracted from the content of his argument”¹⁷⁹ The component elements of the presentation had all been admitted into evidence, and thus had been provided to the defense team in advance of trial “so that they could be scrutinized for any objectionable aspects.”¹⁸⁰ Significantly, however, “[t]he uses of those

176. *Id.*; see also Eileen M. Siemek & Sandra K. Numedahl, *Automated Evidence Presentation Software: An Emerging Trend for the Courtroom—Part II*, COLO. LAW., Jan. 1999, at 75, 76 (“It is undisputed that evidentiary comprehension is improved and time can be saved using automated evidence presentation software.”). *But see* DAVID BALL, THEATER TIPS AND STRATEGIES FOR JURY TRIALS 334 (3d ed. 2003) (“Your most important visual pictures, diagrams, or charts should be mounted on foam core boards that you can pick up and show, and that stay around the courtroom after you show them.”).

177. Siemek & Numedahl, *supra* note 176, at 75. The authors do not express great concern for the possibility that the use of technology, by itself, may determine a case’s outcome; however, they do acknowledge that “[t]he struggle of where due process and reasonable discretion end, and where unreasonable persuasion and showmanship start may be the challenge for the courts in the advancing technological age.” *Id.* at 76.

178. Carney & Feigenson, *supra* note 4, at 33.

179. *Id.*

180. *Id.* at 31. Clearly, the prosecution’s use of its multimedia closing argument is not protected

elements in the closing argument . . . were not disclosed, in order to protect the attorneys' work product."¹⁸¹ It is precisely that use and juxtaposition of the elements that makes the presentation so problematic.¹⁸²

Because the prosecution has the burden of proving a defendant's guilt beyond a reasonable doubt, it is given the last word during rebuttal, after the defense has offered its closing.¹⁸³ It was in this rebuttal part of its closing argument—after which the defense had no opportunity to respond—that the State presented its most damaging material.¹⁸⁴ Applying existing case law regarding the rules of closing argument, as well as principles of persuasion outlined above, the *Skakel* prosecution's summation may be analyzed more closely.

A. Manipulation of Written Text

Significantly, the words that the State would later highlight with devastating effect in its rebuttal argument were not even alluded to in its initial closing. The only mention of Michael Skakel's alibi in the first part of the State's closing argument suggested that the jury might "want to take a careful look" at how the alibi was produced.¹⁸⁵ The prosecutor went on to suggest that the alibi had been contrived and agreed upon by the members of "a very close-knit group, each with a notable interest in the defendant's welfare."¹⁸⁶ No mention was made of Michael Skakel's own statement on the matter. In his closing, the defense attorney spent some time discrediting the testimony of Andrea Shakespeare, but he too did not once refer to Michael Skakel's comment about Andrea having gone home.¹⁸⁷ Although that portion of the tape had been admitted and played at trial, it represented a very small part of the thirty-two-minute recording.¹⁸⁸ Based on the State's initial closing, the defense had no reason to believe that the State would call particular attention to it, and so, had no reason to address the

simply because each underlying image had been admitted into evidence. *See supra* Part IV.B.

181. Carney & Feigenson, *supra* note 4, at 31. The doctrine that protects attorneys' work product from discovery comes from *Hickman v. Taylor*, 329 U.S. 495 (1947) and has been codified in large part by Rule 26(b)(3) of the *Federal Rules of Civil Procedure*. FED. R. CIV. P. 26(b)(3). *But see infra* note 233 (explaining that the work product doctrine does not provide absolute immunity).

182. *See* text accompanying note 120 (discussing the great impact that the juxtaposition of images may have); *see also Morning Edition* (NPR radio broadcast Feb. 4, 2005) ("It's that juxtaposition and the stunning effect that that juxtaposition had that the defense is truly objecting to.").

183. Springer, *supra* note 4.

184. *Id.*

185. Transcript of Closing Arguments, *supra* note 44, at 20.

186. *Id.* at 21.

187. *Id.* at 56–59.

188. Appellee's Brief, *supra* note 7, at 55.

issue at all.¹⁸⁹

With respect to this part of the State's rebuttal closing, the most basic rule of closing argument applies: except for summarizing charts or diagrams, material used in closing argument must have been admitted into evidence during trial.¹⁹⁰ When the audiotape and projected transcript of Michael Skakel's words were admitted at trial, Skakel's words were projected in black against a white background.¹⁹¹ When the State presented the same part of the tape and transcript in closing argument—what the State has called “momentous evidence”—the words “and I remember that Andrea had gone home” were greatly enlarged and appeared in red.¹⁹² This raises the question: Was this the “same” image that had been placed in evidence earlier? Undoubtedly, the color red was not arbitrary: “Because color speaks immediately to our emotions and has such an intense effect on us, it, too, has become of primary interest to researchers, medical doctors, psychologists, and, of course, to advertisers searching for the most persuasive appeal.”¹⁹³ The color red is widely recognized as the color that best attracts a viewer's attention—apart from its obvious association with blood.¹⁹⁴

The subtle, “subliminal”¹⁹⁵ effects of graphically enhanced material are not consciously perceived, but are powerful persuaders nonetheless.¹⁹⁶ Arguably, graphically enhanced material is *not* the same as that presented at trial, and should not be allowed in closing argument. The unfairness of the presentation of enhanced material takes on greater significance in light of the fact that defense counsel had no warning that the evidence was likely to be presented, and no chance to respond to it.

189. See 75A AM. JUR. 2D *Trial* § 542 (1991) (“As a general rule, it is improper for counsel or a prosecuting attorney to argue matter or raise points during the closing summation or rebuttal which have not been covered in the opening summation.”).

190. LAGARIAS, *supra* note 136, § 1.19.

191. Carney & Feigenson, *supra* note 4, at 27.

192. Appellee's Brief, *supra* note 7, at 56–57.

193. BARRY, *supra* note 119, at 264.

194. See *id.* at 131 (“Warm colors tend to advance and cool to recede.”); see also BALL, *supra* note 176, at 332–33 (explaining that “the juror's eye goes first to bright, rich colors”).

195. The term “subliminal” in this context refers to perceptions “outside the area of conscious awareness.” WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2276 (1971).

196. Northwestern University Law School in Chicago offers a course that teaches “students how to use technology to jazz up evidence, including how to style documents to resemble magazine layouts (complete with words blown up for visual effect).” Chanen, *supra* note 14, at 56.

B. Selective Editing of Audiotape

Turning to the issue of the selectively edited audiotape, which suggested that Michael Skakel was confessing to murder when he expressed panic about being seen the night before, *Ammons* and *Muhammad* are instructive.¹⁹⁷ In closing argument, an attorney does not need to restate *all* dialogue from an extended interview. Selectively edited audiovisual material in closing argument, however, is problematic. The calculated editing of an audiotape of a defendant's own words, for example, makes an omission less obvious, especially where other elements may be distracting the listener's attention from the accuracy of the tape;¹⁹⁸ the omission is thus "masked" by the other layers of information.¹⁹⁹

The *Muhammad* court declined to adopt a per se rule about playing selected portions of videotaped testimony during summation;²⁰⁰ it did, however, note that "[s]killful editing has the capacity to encapsulate the strong points of a party's case, with the corresponding capacity to give the jury a myopic view of the facts."²⁰¹ Although the court affirmed the trial court's decision to allow the replaying of videotaped testimony, it also recognized the "significant potential for abuse."²⁰² The court cautioned that "[c]are must be taken that the video excerpts shown during summation . . . do not distort or misstate the evidence."²⁰³

Chief Justice Marshall opined in 1819 that "the subject, the context, the intention of [a person's words], are all to be taken into view."²⁰⁴ The context of Michael Skakel's statements regarding his feeling of panic on the morning of October 31, 1975, was extremely important. The audiotape of his words was admitted and played in context during trial.²⁰⁵ In summation, Skakel's words about masturbating, his embarrassment, and his fear of getting caught, were purposely omitted or masked.²⁰⁶ The masking of those words—which *immediately preceded* those that the jury heard just before

197. *People v. Ammons*, 622 N.E.2d 58 (Ill. App. Ct. 1993); *State v. Muhammad*, 820 A.2d 70 (N.J. Super. Ct. App. Div. 2003). See *supra* text accompanying notes 159–65 (discussing these two cases).

198. See *supra* text accompanying notes 105–07 (describing the projection of gruesome crime-scene photographs as Skakel's words were spoken and displayed).

199. See *supra* Part III.B (describing layering and masking techniques).

200. *Muhammad*, 820 A.2d at 80. The material at issue in *Muhammad* was videotaped testimony of five witnesses who testified for the State during trial. *Id.* at 76.

201. *Id.* at 82.

202. *Id.* at 80, 83, 87.

203. *Id.* at 81.

204. *M'ulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 415 (1819).

205. Appellee's Brief, *supra* note 7, at 55.

206. Appellant's Brief, *supra* note 7, at 78.

they deliberated on their verdict—intentionally created an illusion.²⁰⁷ In the State’s closing argument, “an admission of masturbation literally became a confession to murder.”²⁰⁸

The *Ammons* court reversed the decision of the trial court that had allowed the inclusion, in the State’s closing argument, of a *complete* audiotape of the defendant’s statement.²⁰⁹ The issue there was not selective editing, but rather the weight that the material would carry given the timing of its presentation “during the trial’s waning moments.”²¹⁰ The court also noted that “[w]hile error may be harmless where the evidence of [a] defendant’s guilt is overwhelming,” that was not, in fact, the situation in the close case before it.²¹¹ In such a case, replaying audiotaped testimony in closing would be unfairly prejudicial and should not be allowed.²¹² *Skakel* was just this sort of close case; referring to the “surprising” guilty verdict, legal analyst Jeffrey Toobin said, “I have never seen a case that was more clearly won on a closing argument.”²¹³

C. Juxtaposition of Words and Images

In addition to the possibility that critical information was masked in the State’s summation, it is arguable that its closing was improper for drawing faulty parallels, “creat[ing] deceptive visual connections.”²¹⁴ First, Skakel’s story of masturbating was misleadingly associated with the murder.²¹⁵ While showing a photograph of a blood smear on the murder victim’s inner thigh, the prosecutor asserted, “[t]his is evidence” that Skakel had masturbated over Moxley’s dead body.²¹⁶ With neither physical nor testimonial evidence to support such an allegation, the “illustration” of such an assertion was unfairly prejudicial and highly inflammatory. Where no semen or other evidence of sexual assault was found, and no credible testimony was offered to support that story,²¹⁷ the only connection that the

207. See *supra* text accompanying note 122 (asserting that “illusion making” does not serve the goal of “truth-telling”).

208. Appellant’s Brief, *supra* note 7, at 78.

209. *People v. Ammons*, 622 N.E.2d 58, 60 (Ill. App. Ct. 1993).

210. *Id.*

211. *Id.*

212. *Id.*

213. Green & Leavenworth, *supra* note 60; CNN.com/Law Center, *Observers: Closing Won Conviction Against Skakel* (June 8, 2002), <http://edition.cnn.com/2002/LAW/06/07/skakel.trial/>; see also text accompanying notes 60–61 (discussing the “surprising” jury verdict).

214. Appellant’s Brief, *supra* note 7, at 78.

215. *Id.*

216. Transcript of Closing Arguments, *supra* note 44, at 11–12.

217. Appellant’s Brief, *supra* note 7, at 77. A witness who knew Skakel from Elan, and who

jury could draw from the juxtaposition of the image with the prosecutor's words would be a faulty one.

Moreover, in both phases of its closing argument, the State suggested that when Skakel spoke of masturbating in a tree—the story that the State had also tried to discredit as a recent fabrication—he was speaking of the tree below which Martha's body was discovered.²¹⁸ By repeatedly showing the victim's body as it was found beneath that tree at the same time he related Skakel's story about masturbating up *some* tree, the prosecutor visually reinforced for the jury what was, at best, a dubious connection—that the two trees were one and the same.²¹⁹

Lastly, the layering and juxtaposition of lurid crime-scene photos with the selectively edited audiotaped “confession” directly connected Skakel's voice and words with Martha Moxley's death. Photographs of the victim, alive and happy, dissolved into hideous photographs of her lying face down and naked on the ground; these flashed in synchrony every time Skakel said the word “panic.”²²⁰ Where courts have found that color slides are too inflammatory and prejudicial to allow their use in closing argument, it is difficult to imagine how they can properly allow this layered display of photographic images, audiotape, and text.²²¹

CONCLUSION

Our legal system is based, in large part, on the adversarial process, wherein opposing parties present their cases as best they can, and attempt to weaken their adversary's case; in most cases it is ultimately effective for reaching the truth. The process, however, depends upon participants presenting reliable evidence serving the interest of fairness and justice.²²² Unreliable evidence, or presentations that deceive and distort, must be rejected.²²³ Unlike the magician's audience, who are wholly aware and even entertained while being deceived, the jury expects to see everything it needs to see to render a sound decision.²²⁴ Ideally, in a legal proceeding,

died of a heroin overdose prior to trial, stated in prior testimony that Skakel had told him that he returned to the victim's body two days after the murder to masturbate over her. *Id.* at 77 n.78. As the body was found and removed the day after the murder, clearly, this could not have been true. *Id.*; Springer, *supra* note 4.

218. Transcript of Closing Arguments, *supra* note 44, at 17, 113.

219. *Id.* at 139.

220. Appellant's Brief, *supra* note 7, at 78.

221. *Stringer v. State*, 500 So. 2d 928, 935 (Miss. 1986); *see also supra* text accompanying notes 168–71 (discussing the *Stringer* case).

222. 21 AM. JUR. 2D *Criminal Law* § 238 (1998).

223. *Id.*

224. TUFTE, VISUAL EXPLANATIONS, *supra* note 116, at 64.

“the point is not at all to baffle the audience but rather to unveil and explain complex data clearly, accurately, unmistakably.”²²⁵ Likewise, the system depends on competent counsel to protect the interests of the represented party by means of objection, cross-examination, and rebuttal. Where a visual presentation may illegitimately conceal and disguise information, counsel cannot reasonably be expected to perform properly this protective function. “In conjuring, The Mask makes the magic; elsewhere, The Mask makes a lie.”²²⁶ The legal domain, in other words, is no place for legerdemain. Additionally,

[d]isplays of evidence implicitly but powerfully define the scope of the relevant, as presented data are selected from a larger pool of material. . . . That selection of data—whether partisan, hurried, haphazard, uninformed, thoughtful, wise—can make all the difference, determining the scope of the evidence and thereby setting the analytic agenda that leads to a particular decision.²²⁷

Even where there is no claim of obvious distortion or disinformation, courts might still consider the disparately influential impact of sophisticated multimedia presentations as compared with traditional closing argument, particularly rebuttal closing argument. The extremely high cost of high-tech presentations may carry with it inherent unfairness, irrespective of any issue of unfair content.²²⁸

A policy that more closely monitors the honesty and accuracy of both form and content of multimedia presentations in closing argument is also necessary to counteract the less than flattering image that lawyers have (rightly or wrongly) earned.²²⁹ Lawyers are already widely perceived as unscrupulous and dishonest because of their manipulation of the truth in furthering their clients’ interests.²³⁰ To some extent a trial has always been

225. *Id.*

226. *Id.*

227. *Id.* at 43.

228. See Frank Herrera Jr. & Sonia M. Rodriguez, *Courtroom Technology: Tools for Persuasion*, TRIAL, May 1999, at 66, 66–67 (noting that the new technologies “pose several intriguing questions that arise from basic concerns for fairness, cost, and accessibility”).

229. See ABRAHAM LINCOLN, NOTES ON THE PRACTICE OF LAW, reprinted in ABRAHAM LINCOLN: SPEECHES AND WRITINGS: 1832–1858, at 246 (Don E. Fehrenbacher ed., 1989) (“There is a vague popular belief that lawyers are necessarily dishonest. . . . [T]he impression, is common—almost universal.”).

230. Stephen D. Easton, *The Power of the Truth: An Honest Attorney’s Guide to Winning Jury Trials in a Dishonest World*, 62 TEX. B.J. 234, 237 (1999) (“In a recent study, a jury research firm asked potential jurors if they thought an attorney would lie in court to promote his cause. Sixty-two percent of those potential jurors believed it was likely that an attorney would lie to them.” (footnote omitted) (citing Jeanne J. Fleming & Leonard Schwarz, *Juror Opinion Survey Reveals Obstacles for Litigators*,

“both a search for truth and a rhetorical contest.”²³¹ The proliferation of high-tech presentations may further undermine the public image of the legal profession by blurring the line between true legal advocacy and salesmanship.

There are a number of possible approaches to address these issues. Multimedia presentations might be subjected to prior scrutiny by the court and opposing counsel. Where the advent of digital display technology has exponentially increased the possibilities for information manipulation, we must consider new standards to protect the integrity of the judicial system. Close scrutiny is necessary “where a party chooses limited excerpts as part of its argument.”²³² Where the possibilities of improper prejudicial influence on a jury are inherent in the very form of the medium, the shield of work product protection is inappropriate.²³³

Minimally, opposing counsel should be informed of an attorney’s intention to incorporate audiovisual displays and digitized graphics in summation.²³⁴ Alternatively, where multimedia closing presentations are not subject to prior scrutiny, they should not be allowed in *rebuttal* closings. Opposing counsel ought to be afforded an opportunity to respond to such presentations where the form of the presentation itself has the potential for exerting too great an influence on the jury.

INSIDE LITIG., Dec. 1991, at 21, 21)). Easton adds:

On the plus side, 10 percent believed it was “very unlikely” that an attorney would lie. This should give us little comfort, though. Public opinion experts say that almost every survey will show 10 percent of the people stating that the moon is made of cheese, that the earth is flat, or that some other equally implausible notion is correct.

Id. at 240 n.2.

231. Neal Feigenson, Christina Spiesel & Richard Sherwin, *The Law/Media/Culture Project and its Implications for Legal Theory and Education* 16–17 (2004) (unpublished manuscript, on file with the Vermont Law Review) (outlining the ways in which “visual displays” as compared with “purely verbal communications” can affect legal judgments, and asserting that it is “critical to ponder how far visual displays reproduce, and how far they transform, the ancient disputation between wisdom and eloquence”).

232. *State v. Muhammad*, 820 A.2d 70, 82 (N.J. Super. Ct. App. Div. 2003).

233. *See* 39 AM. JUR. 3D *Proof of Facts* § 7 (2004) (“The work product doctrine does not provide the absolute immunity from discovery that the attorney-client privilege (if not waived) and other privileges provide. This distinction is one reason why work product protection is usually referred to as a ‘doctrine,’ rather than a privilege. The doctrine is sometimes referred to as a ‘qualified privilege’ or ‘qualified immunity,’ but the operative distinction is really that there are standards of need by an opposing party which, if met, will override the protection.”).

234. *See Muhammad*, 820 A.2d at 81 (“An attorney who intends to use this technique should so inform the court and all other counsel at the earliest possible time, certainly before any party sums up. If not sooner, the intent should be disclosed at the charge conference.”).

According to Hugh Keefe, professor of trial practice at Yale University, “courtrooms, contrary to public opinion, can be terribly boring places . . . so an issue for trial lawyers always is . . . how to sex it up.”²³⁵ Viewed on a small laptop screen, away from the courtroom and years after the jury delivered its verdict, the audiovisual display in *Skakel* appears less than “sexy.” It likely heralds, however, more sophisticated productions in the future. If justice is to be more than just an exhibition of showmanship and “razzle dazzle,” it requires scrupulous attention to providing a jury with information that can reasonably be expected—both in form and content—to assist them in reaching a rational and fair conclusion.

Evelyn Marcus

235. *Morning Edition*, *supra* note 182.