South Carolina Bar
Continuing Legal Education Division

2019 SC BAR CONVENTION

Torts & Insurance Practices Section

"Effective Opening Statements and Closing Arguments in Personal Injury Cases"

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SC Supreme Court Commission on CLE Course No. 190336

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION

JERRY SESSIONS, Plaintiff, v. REO TRUCK HOLDINGS CORP., Defendant.	Cause No. CV 11-09-M-DLC **COMPLAINT AND JURY DEMAND**

COMES NOW the above-named Plaintiff and alleges as follows:

1. At all times material herein, Plaintiff, Jerry Sessions, was a citizen of the State of Montana, residing in Lewis and Clark County, Montana.

2. At all times material herein, Defendant, REO Truck Holdings Corp. (REO), was a foreign corporation, incorporated under the laws of a state other than Montana, with its principal office and principal place of business located in Ohio. REO is a citizen of the State of Ohio.

JURISDICTION AND VENUE

3. Plaintiff restates each and every fact and allegation set forth in paragraphs 1-2 above.

4. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1332, as it involves a controversy between a citizen of the State of Montana and, pursuant to 28 U.S.C. § 1332 (c)(l), corporations that are deemed citizens of a state other than Montana, and because the amount in controversy exceeds $75,000.00, exclusive of interest and costs.

GENERAL ALLEGATIONS

5. Plaintiff restates each and every fact and allegation set forth in paragraphs 1-4 above.

6. In 1992, a company named REO Truck Holdings Corp. was manufacturing and selling in the United States of America, various trucks, including a truck known as a Model WX Low Cab-Over-Engine (LCOE).

7. At all times relevant to this action, Plaintiff was an employee of Modern Waste Systems, Inc., working primarily in Lewis and Clark County, Montana, and the surrounding areas.

8. On June 23, 2010, while working in the course and scope of his employment with Modern Waste Systems, Inc., Plaintiff was instructed to accompany a co-worker to empty residential refuse containers in Elliston,

Lewis and Clark County, Montana. Plaintiff and his co-worker used Modern Waste Systems truck No. 229 to complete this task. Plaintiff's co-worker drove truck No. 229, and Plaintiff was the individual who worked on the ground emptying and handling the residential containers.

9. Truck No. 229 was a front loading waste truck. The cab and chassis of truck No. 229 was manufactured by REO Truck Holdings Corp. in 1992.

10. On June 23, 2010, a carry can was fitted onto the front forks of truck No. 229, into which Plaintiff dumped each residential trash container in Elliston, Montana. The carry can that was fitted onto the front forks of truck No. 229 was made and installed by companies other than REO.

11. On June 23, 2010, there was a lift assist device (a/k/a a tipper unit) attached to the carry can to which Plaintiff would connect each residential trash container and the tipper unit would lift each residential trash container, dumping its contents into the carry can. The tipper unit on the carry can in use by Plaintiff on the day of the incident in question was manufactured by a company other than REO and placed into the stream of commerce by that entity.

12. While performing his duties in the normal and customary fashion, Plaintiff, after dumping a residential trash container into the carry can located on the front forks of truck No. 229, would return to the passenger side of truck No. 229, near the front, and stand on the step located there while traveling to the next residential trash container.

13. While riding on the step located on the right side near the front of truck No. 229, which step was positioned in front of the front tires of the truck, Plaintiff fell from the step and was run over by the tires of truck No. 229. As a result of being run over by truck No. 229, Plaintiff suffered severe and permanent injuries.

COUNT I – DEFECTIVE DESIGN

14. Plaintiff restates each and every fact and allegation set forth in paragraphs 1-13 above.

15. The intended or reasonably foreseeable use of truck No. 229, as it was configured for use on June 23, 2010, including having the carry can fitted on the front forks of the truck, was for workers, such as Plaintiff, while traveling between residential containers, to ride on the outside of the cab on the step in front of the right front tire of the vehicle, where grave injury or

death can occur if a worker falls. As a result of this design, truck No. 229, as it was configured for use on June 23, 2010, including the use of the carry can fitted on the front forks of the truck, and the absence of a designated handhold and a safe step or platform on which Plaintiff could stand and ride, was in a defective condition unreasonably dangerous at the time of this incident, which condition caused Plaintiff's injuries, and for which Defendant is strictly liable.

COUNT II – FAILURE TO WARN

16. Plaintiff restates each and every fact and allegation set forth in paragraphs 1-15 above.

17. Modern Waste Systems truck No. 229, as it was configured on June 23, 2010, including the use of the carry can and tipper unit fitted on the front forks of the truck, was in a defective condition unreasonably dangerous because it lacked any useful warning regarding the dangers of using truck No. 229 in the manner that Plaintiff was using it, as described herein, which use was intended or reasonably foreseeable to Defendant.

18. This lack of a useful warning rendered truck No. 229 in a defective condition unreasonably dangerous, which condition caused

Plaintiff's injuries and for which Defendant is strictly liable.

WHEREFORE, Plaintiff prays for judgment against Defendant as follows:

a. For all damages to which Plaintiff is entitled under Montana law as a result of his serious and severe injuries;

b. For all past and future lost earnings;

c. For all past and future medical services and other expenses;

d. For all past and future general damages;

e. For his costs and disbursements incurred herein; and

f. For any further relief to which he is entitled under Montana law or which this Court deems just under the circumstances.

JURY DEMAND

Plaintiff demands that all issues in this matter be tried before a jury.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION

JERRY SESSIONS, Plaintiff, v. REO TRUCK HOLDINGS CORP., Defendant.	Cause No. CV 11-09-M-DLC **ANSWER TO COMPLAINT AND JURY DEMAND**

Defendant, REO Truck Holdings Corp. (REO) answers Plaintiff's Complaint as follows:

1. REO admits the allegations of paragraph 1.

2. REO admits the allegations of paragraph 2.

3. Answering the allegations of paragraph 3, REO incorporates its responses to the preceding paragraphs.

4. Answering the allegations of paragraph 4, REO admits the Court has jurisdiction.

5. Answering the allegations of paragraph 5, REO incorporates its responses to the preceding paragraphs.

6. REO admits the allegations of paragraph 6.

7. REO lacks knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 7, and therefore denies the same.

8. Answering the allegations of paragraph 8, upon information and belief, REO admits Plaintiff was working for Modern Waste Systems, Inc. on June 23, 2010. He accompanied a co-worker to empty residential refuse containers in Elliston, Lewis and & Clark County, Montana. Plaintiff and his co-worker used Modern Waste Systems truck No. 229 to complete this task. REO lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations of paragraph 8, and therefore denies the same.

9. Answering the allegations of paragraph 9, REO admits the cab-chassis portion of the truck at issue was assembled in November 1992 by REO Truck Holdings Corp. and sold to Trucks of Denver, Inc. When the truck left REO's custody, it was an incomplete vehicle. REO did not know how a final stage manufacturer would ultimately configure or outfit the vehicle. REO lacks knowledge or information sufficient to form a belief as to any allegations of paragraph 9, and therefore denies the same.

10. REO lacks knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 10, and therefore denies the same.

11. REO lacks knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 11, and therefore denies the same.

12. Answering the allegations of paragraph 12, REO affirmatively states that the step on the passenger side was not a riding step. It was a step which allowed for entry and exit into the cab. This was evidenced by, *inter alia,* the truck's Owner's Manual and applicable standards of the American National Standards Institute and the National Solid Waste Management Association. Plaintiff knew or should have known that riding on the step was an unreasonable misuse of the product. As such, REO denies Plaintiff's misuse of the step was "normal and customary." REO lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations of paragraph 12, and therefore denies the same.

13. Answering the allegations of paragraph 13, REO admits the step on the passenger side of the truck was located in front of the front tires of the truck, as the step was provided for the sole purpose of allowing access to the cab. REO lacks knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 13, and therefore denies the same.

14. Answering the allegations of paragraph 14, REO incorporates its responses to the preceding paragraphs.

15. REO denies the allegations of paragraph 15.

16. Answering the allegations of paragraph 16, REO incorporates its responses to the preceding paragraphs.

17. REO denies the allegations of paragraph 17.

18. REO denies the allegations of paragraph 18.

19. REO denies every allegation not specifically admitted or otherwise addressed above.

20. REO denies the allegations in Plaintiff's Prayer for Relief.

FIRST AFFIRMATIVE DEFENSE

The product at issue was not sold in a defective condition unreasonably dangerous.

SECOND AFFIRMATIVE DEFENSE

The product at issue was unreasonably misused by Plaintiff and/or other individuals, whether owners or users, and that misuse caused or contributed to the injury.

THIRD AFFIRMATIVE DEFENSE

To the extent a defect existed, which REO denies, Plaintiff discovered the defect or the defect was open and obvious and Plaintiff unreasonably made use of the product and was injured by it.

FOURTH AFFIRMATIVE DEFENSE

The product at issue did not reach the user or consumer without substantial change in the condition in which it was sold by REO. The product may have been altered, misused, abused, improperly maintained, or modified by persons or entities other than REO, and over whom REO had no control.

FIFTH AFFIRMATIVE DEFENSE

REO's product did not cause Plaintiff's injuries.

SIXTH AFFIRMATIVE DEFENSE

Plaintiff's injuries were caused in whole or in part by a superseding or intervening cause beyond REO's control.

SEVENTH AFFIRMATIVE DEFENSE

The injuries to Plaintiff were not caused by any act or omission of REO.

EIGHTH AFFIRMATIVE DEFENSE

To the extent Plaintiff is alleging negligence on the part of REO, Plaintiff's claims are barred by his own negligence and assumption of the risk with respect to the use of the product.

NINTH AFFIRMATIVE DEFENSE

To the extent Plaintiff is alleging negligence on the part of REO, Plaintiff's injuries were caused, in whole or in part, by the negligence of other persons, including those who may be indispensable parties. The trier of fact shall consider the negligence of all such persons, and any recovery by Plaintiff must be barred or reduced accordingly.

TENTH AFFIRMATIVE DEFENSE

Plaintiff has a duty to mitigate his damages.

ELEVENTH AFFIRMATIVE DEFENSE

REO adequately warned of the risks of using the product.

TWELFTH AFFIRMATIVE DEFENSE

REO reserves the right to add additional affirmative defenses, if necessary, during or upon conclusion of investigation and discovery.

WHEREFORE, having fully answered Plaintiff's Complaint, REO prays for judgment as follows:

1. That Plaintiff's Complaint be dismissed with prejudice;

2. That Defendant recover the costs incurred in defense of this matter; and

3. Such other and further relief as the Court deems just and equitable.

JURY DEMAND

REO respectfully requests a trial by jury on all issues in the Complaint.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION

JERRY SESSIONS, Plaintiff, v. REO TRUCK HOLDINGS CORP., Defendant.	Cause No. CV 11-09-M-DLC **STATEMENT OF STIPULATED AND AGREED FACTS**

These are facts that are agreed to by the parties, Plaintiff, Jerry Sessions, and Defendant, REO Truck Holdings Corp. The facts recited here are not and may not be disputed. All witnesses should be shown these facts and any witness may use these as background facts in their testimony.

This case will be tried solely on the issue of liability. The claims and defenses appear in the Complaint and Answer of the parties.

1. On June 23, 2010, Jerry Sessions, the Plaintiff, was employed as a "gofer" at the Modern Waste Systems facility in Helena, Montana, assisting with cleaning of garbage collection equipment and minor repairs. Though not part of his normal job, he was assigned to assist Cory Lewin on Lewin's trash collection route that day.

2. All garbage collection vehicles at MWS are intended to and are regularly operated by one employee, although there are occasions when two employees are working a route. Mr. Lewin had injured his back the day before and Sessions' boss assigned Sessions to be Lewin's helper on the collection route on June 23.

3. The collection route was to the south and west of Helena, extended to Elliston and Avon.

4. Lewin did not see Sessions fall. Sessions does not remember anything about how he fell.

5. Sessions was severely injured, including what is referred to as a "degloving injury" from crotch to ankle of his left lower extremity.

6. The incomplete vehicle involved in this case was built into a completed vehicle that served as a side loader garbage truck in service for the City/County of Denver, Colorado. The truck was placed in garbage service in Denver and remained there until approximately 2000. Denver sold the truck, with its side-loader garbage equipment, at a surplus auction. It was purchased at auction by Modern Waste Systems of Helena, Montana.

7. Modern Waste Systems modified the truck to make it a front-loading garbage truck. To do so, MWS extended the wheelbase, installed heavier-capacity springs and installed increased weight-rating front tires.

8. This case is not the first time REO has been involved in litigation in which it is claimed that a garbage industry worker has fallen from cab access steps. Attached hereto is a chart listing all of the facts and contentions that are known regarding these other incidents, other than some additional information referred to in the deposition of Tony Seward, an employee of REO Truck Holdings or in the expert reports of Pete Grill (Plaintiff's expert) and Johnny Miller (defense expert).

STATEMENT OF ADDITIONAL FACTS

The following facts, whether provided in summary, narrative or by way of photographs, are part of the case file in the case of *Sessions v. REO Truck Holdings Corp.*

1. Medical billing summary, attached as **Exhibit 1**. It is stipulated that all medical expenses listed were reasonable and necessarily incurred as a consequence of the injuries to the plaintiff, and total $292,537.99.

2. The plaintiff, Jerry Sessions, held a general cleaning and errands job with Modern Waste Systems. He is slightly developmentally delayed and spent most of his time washing out the garbage trucks and doing cleaning of the floors and drains in the Modern Waste Systems shop building. Mr. Sessions had been employed at Modern Waste Systems in that same job for slightly over two years. As a result of his injuries, he is now unable to perform that job.

3. There are no anticipated future medical expenses, but plaintiff is left with a permanent limp and ongoing occasional pain that he treats by taking over-the-counter medications.

4. Plaintiff's expert economist estimates lost earnings and lost earning capacity in the future, including loss of household services, at $714,317. The defense has no economic loss witness.

5. Attached as **Exhibit 2** is a photograph of the steps on the driver's side of the truck at issue in this case showing the presence of the serrated edge bolted onto the driver's side steps.

6. Attached as **Exhibit 3** are photographs of the de-gloving injury suffered by the plaintiff. The Court has allowed the use of the photographs if any party chooses to do so, overruling the defense objection that the photographs are more prejudicial than probative.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION

JERRY SESSIONS, Plaintiff, v. REO TRUCK HOLDINGS CORP., Defendant.	Cause No. CV 11-09-M-DLC **VERDICT FORM**

We, the jury, lawfully empaneled in the above-entitled cause find as follows:

1. Was the chassis-cab manufactured by REO in a defective condition unreasonably dangerous at the time of its sale?

   (Answer "yes" or "no" by marking the appropriate line below with an "X".)

   Yes _____ No _____

Proceed to answer Question No. 2 below.

2. Was the chassis-cab manufactured by REO defective because REO did not provide users or consumers with a post-manufacture warning against riding on the cab access steps?

   (Answer "yes" or "no" by marking the appropriate line below with an "X".)

   Yes _____ No _____

If your answers to Question Nos. 1 or 2 or both 1 and 2 are "yes," proceed to answer Question No. 3. If your answers to Question Nos. 1 and 2 are "no," stop deliberations. The foreperson should date and sign the form and notify the bailiff that the jury has reached its verdict.

3. Did the defective condition of the chassis-cab manufactured by REO cause injury to the plaintiff Jerry Sessions?

(Answer "Yes" or "No" by marking the appropriate line below with an "X".)

Yes _____ No _____

If your answer to Question 3 is "no," the foreperson should date and sign the form and notify the bailiff that the jury has reached its verdict. If your answer to Question 3 is "yes," proceed to answer Question No. 4.

4. Did Jerry Sessions unreasonably misuse the truck in a way that caused his own injuries?

(Answer "yes" or "no" by marking the appropriate line below with an "X".)

Yes _____ No _____

If your answers to Question Nos. 3 and 4 are "yes," proceed to answer Question No. 5.

5. You must now compare REO's responsibility for bringing about Jerry Sessions' injuries with Jerry Sessions' misuse in bringing about his own

injuries by assigning a percentage of cause to both. The total of the percentage of responsibility assigned to both defendant and plaintiff must equal 100%.

Plaintiff Sessions _____%

Defendant REO _____%

Total 100%

Once you have answered Question No. 5 (if applicable), the foreperson should date and sign the form and notify the bailiff that the jury has reached its verdict.

Dated this ____ day of October, 2017.

_____

Foreperson

Effective Opening Statements

I. Introduction

The opening statement is one of the most important components of any trial. It is your first opportunity to present the case to the jury, and to shape the jury's perspective of the entire trial. The opening statement also is your first opportunity to present yourself to the jury, and to establish the kind of credibility that will persuade jurors to trust the testimony, documents, and other evidence that you eventually will submit for their consideration. A superb opening can set you on a path toward winning the case, but a disastrous opening may be difficult to overcome. Thus, the content and the presentation of your opening statement must be developed with care.

As a general rule, counsel may not argue during opening. Rather, the opening statement should serve as a preview of the anticipated testimony, exhibits, and other evidence. Think of the opening statement as a forecast, designed to provide a general understanding and provoke further interest, like the kind of preview you might see on the inside jacket of a novel. The jacket text that introduces a novel typically does not confuse the prospective reader with an overly detailed chronology of events; it does not bore the reader with a recitation of the characters' names in the order they will appear in the book; and it does not command the reader to feel a certain way about the story contained in its pages. Instead, the jacket text captures the essence of the book in a way that gives the reader a general sense of the book's theme, entices the reader to proceed further, and leaves the reader to make his own judgment regarding the final meaning of the story. That is the way jurors should be left at the end of the opening statement – with an understanding of the case's theme, an eagerness to learn more, and an appreciation for the ultimate judgment they will be asked to make.

II. Elements of the Opening Statement

Theme of the Case

In the opening statement, a lawyer should provide the jury with a theme that will serve as a framework for every piece of evidence the jury hears during the case. The theme should communicate how the evidence will fit together, and why your client's position in the case is the right one. For instance, a lawyer defending a discrimination case may have a theme of "unheeded warnings" to communicate that the plaintiff had a chance to improve their performance before termination, but failed to take advantage of the opportunity. Plaintiff's counsel in the same case may have a theme of "repeated disciplinary actions, all motivated by race." Obviously, expressing a theme is difficult to do without bordering on argument – which is improper in the opening statement – but courts generally allow a lawyer to state a theme at the beginning and end of the opening statement, as long as the rest of the opening is not argumentative.

A good way to develop a theme is to try to describe your case in one summary sentence, without legalese, as you might do if you were explaining your case to a non-lawyer family

member. Get to the heart of the issue – think about the parties' motivations, and the reasons events unfolded the way they did. Answer the question: What really happened here?

Perhaps the case centers on someone's personality flaw. In the employment context, a plaintiff's lawyer may focus on a sexual harasser who "can't take no for an answer"; a defense lawyer's theme may focus on an employee's "refusal to accept his own failure". Perhaps the theme of the case is a situation, such as "a company where minorities are routinely kept in lower-level jobs" or "a supervisor forced to make difficult choices when the company hit hard times." Whatever the theme of your case, make sure it is a concept that resonates with people from all walks of life, and one that is borne out by the evidence you will be presenting during the trial.

Often, the easiest way to present a coherent theme is to state it in a straightforward manner as your introductory sentence: "Ladies and gentlemen, this case is about unfair competition by the defendant." In other situations, the theme may come out more subtly, as you tell a story that slowly unfolds. Regardless of how the theme is presented, make sure it is absolutely clear by the end. Before all of the witnesses and documents are presented to the jury, make sure the jury knows exactly what they should be listening for – from your point of view. (While you can't argue your position, you *can* arrange the facts in such a way that only one conclusion is inevitable.)

Don't Waste Time Getting to the Theme

Many lawyers waste the precious first few minutes of their first impression by shuffling through papers, explaining the purpose of the opening statement, thanking the jury for their time and service to the community, and/or going through lengthy introductions of co-counsel and client representatives. The first impression should be more compelling. Be ready to begin your opening as soon as the moment arrives. Stand up quickly and start speaking with confidence, demonstrating immediately that you are prepared and sure of what you're saying. Tell the jury something interesting in your first few sentences, and then return to the more mundane tasks of introductions and thanks. For example:

> The defendant had a contract with Smith Corporation. He promised that, in exchange for three years of employment at a substantial salary, he would not take Smith's customers and employees when his employment ended. The defendant has broken this promise. When his employment with Smith Corporation ended last December, the defendant stole five clients and three employees, and caused Smith Corporation to lose $10 million in business. That is why we are here today. Ladies and gentlemen, my name is John Jackson. Together with my co-counsel Sue Jones, I represent Smith Corporation. Sitting with us at the plaintiff's table is Robert Smith, the President of Smith Corporation. In this trial, we ask you to hold the defendant responsible for his wrongful acts.

Set the Scene

After introducing your theme, you must set the scene of the case, building upon the framework you have presented. Narrate the scene and introduce people and documents as they naturally fit into the theme of the case – do not present a witness-by-witness catalogue of testimony. For instance, tell the jury how they will learn about the plaintiff's poor job performance. Tell them they will hear from the plaintiff's supervisor, who will explain that the plaintiff was warned on numerous occasions that her attention to detail needed improvement. Explain that the documentary evidence will support the supervisor's testimony, as the jury will see four years of increasingly bad performance reviews. Tell them they will hear from a human resources manager who will put those reviews in context, and compare the reviews to others received by employees company-wide. Present the people and evidence in the context of a story, and the jury will look forward to hearing the story unfold as the trial progresses. This way, the facts will not seem confusing and unrelated as they are presented during the direct and cross examinations. Instead, the jury will remember your narration and recognize each character of your story as he or she appears in the trial.

No Argument In The Opening Statement

Jurors are not supposed to form an opinion on the case until they have heard all of the evidence. Accordingly, as stated above, arguments are improper during opening statements, because arguments may not precede the introduction of evidence. (Note the meaningful difference between the terms "opening statement" and "closing argument.")

How can a lawyer introduce the case without arguing? Generally, if the opening statement explains what you expect the evidence to prove, you are properly opening the case. Unfortunately, there is a subtle difference between what is a proper opening statement and what is an improper argumentative opening statement. Lawyers should avoid expressing opinions; should not make direct statements as to why a particular piece of evidence is not believable; and should not vigorously attack the opponent's case. Nonetheless, a lawyer's position on the case will come through in an effective opening statement, from the order in which facts and evidence are presented; in the choice of which facts are emphasized and which are downplayed; and in the descriptive terms that are used (were they "lewd jokes" or just "sexual banter in the office"?). You can be an advocate without arguing.

The following test is useful to help gauge whether you are recounting facts and evidence or arguing them. Ask yourself this question: Are you describing to the jury what a witness or document states, or are you drawing a conclusion from the testimony or the document? Only the description is permissible in your opening statement; the conclusion must be saved for your closing argument.

Be Persuasive Without Arguing

Despite the rule against arguments in opening statements, lawyers still can be persuasive. Too many lawyers weaken their persuasiveness by trying to make absolutely clear that they are

not arguing. They repeatedly begin sentences with: "The evidence will show . . . ." This quickly becomes boring for the jury to hear, and it is unnecessary. Instead, tell the jury in the beginning that you are going to describe what the evidence will establish, and then never say that again unless there is an objection.

Let the facts themselves argue your case. Assemble the facts, and present them in a manner that leaves only one conclusion – the one you are advancing. If you want to convey that an employee was terminated immediately after complaining of harassment, present the events that way in your opening – describe the complaint, and follow immediately with the termination. On the other hand, if you want to separate the complaint from the termination, describe the complaint, then spend a while describing any intervening events, and *then* address the termination. You will have communicated the lack of relationship between the complaint and the termination not only by the facts, but by the timing and order of your presentation.

If you are successful in positioning your facts and evidence, there is no need to argue what the jury must find, what they must conclude, or the verdict they must deliver. The facts will speak for themselves.

Personalize Your Client

Use the opening as an opportunity to persuade the jury to like your client. Explain your client's motivations, and give the jury reasons to feel camaraderie with your client. If you represent an individual plaintiff, convince the jury of your client's integrity, and persuade them that your client is not just out to make an easy buck; rather, your client suffered real harm. Obviously, a lawyer representing an individual against a corporation may have an easier job personalizing the client, but a management-side lawyer can personalize their client as well, and the need to do so cannot be underestimated. For example, rather than focusing on the corporation itself, a management-side lawyer should tell the jury about the people who comprise the corporation – the relevant supervisors, the human resources representative, and/or the company's owner. Familiarize the jury with these individuals' names, and their roles in the drama, so that the jury will be considering the actions of people versus people in the case, rather than a single, sympathetic plaintiff against a huge, faceless corporation.

Dealing with "Bad Facts"

Should your opening statement address harmful information that is likely to come out at trial? In other words, does an effective lawyer "front" problems in the case? Lawyers inevitably are dealt "good" facts and "bad" facts, "good" evidence and "bad" evidence, "favorable" law and "unfavorable" law. Part of your job is to determine how to face these obstacles.

One option is to address the harmful information before it can be raised by opposing counsel, in order to diffuse the situation. Presenting all issues, good and bad, may ensure your credibility with the jury, and convey that you believe in your case despite any evidentiary hurdles.

A contrary approach is to wait and see whether and how the information comes out before giving it any attention. Jurors commonly do not expect lawyers to say anything negative about their own witnesses, their evidence, or their case. Thus, by focusing on harmful information, you may call greater attention to the damaging information than necessary. Also, remember that once the opening statements have been delivered, the trial itself provides a chance to respond to any charges that the other side makes.

Whether to introduce damaging information obviously is a matter of judgment, and the decision will differ from case to case. A middle ground might include introducing harmful information, but spending only a passing moment discussing it. Or, introduce all positive information first, and only after such information has been laid out for the jury, address the negative information and explain why it is not persuasive, thereby emphasizing its insignificance to the case.

Importantly, defense counsel has the advantage of going second. If the jury did not learn the harmful information during the plaintiff's opening, then the need to deliver the information during the defense's opening is decreased. While the plaintiff may decide to introduce the negative information into evidence later in the trial, consider the possibility that the plaintiff may decide not to introduce the evidence at all; the court may decide not to admit it; or the evidence may come in weakly, without the power you expected. Thus, it may be wiser for defense counsel to avoid discussing any "bad facts" in the opening statement that plaintiff's counsel has not already raised.

Visual Aids

It has been said that a picture is worth 1,000 words. Thus, keep in mind that effective opening statements need not be limited to words. The use of exhibits and visual aids can enhance the value and effectiveness of counsel's opening statement. (Just make sure that you have followed your court's rules on the subject, and have a "plan B" if the court decides not to allow your visual aids.)

Remember, the purpose of the opening statement is to explain what the evidence will show, and a good explanation may include some of the evidence itself. Lawyers generally are allowed to read from, or display, documents and other exhibits that they expect to be admitted into evidence. Less is more in this situation, however – counsel should include only two or three of the most important exhibits, and not confuse or overwhelm the jury with too many details. Use a pointer so the jury can follow as you indicate what the exhibit reflects. To the extent that the evidence includes important photographs, maps, and/or charts, use them. If your case hinges on a performance review, a letter, or a contract provision, enlarge it and show it to the jurors.

Visual aids, which may summarize or analyze the evidence, such as charts, graphs, and chronologies, also are tools that may enhance the opening statement, as they can help jurors understand the eventual trial evidence. As long as the visual aids are not misleading or argumentative, such as "Five reasons why the plaintiff should lose," they should be acceptable for use during the opening statement in most courts. Counsel should remember, however, to

show opposing counsel any visual aids in advance, and to obtain advance permission for their use from the court.

Finally, exhibits that are not visual also may be used during the opening statement. In the right types of cases, it might be advisable to use tape recordings, for example, if they will later be offered into evidence. The key is to get the jurors interested in what you have to say. Visual and other sensory aids will help keep jurors attentive, interested, and informed.

Plaintiff's Opening vs. Defendant's Opening

Delivering an opening statement on behalf of a plaintiff presents different challenges than delivering an opening statement on behalf of a defendant. Plaintiff's counsel must determine whether to anticipate and respond to expected defenses. Defendant's counsel must decide whether to react to the plaintiff's opening.

In the employment context, plaintiff's counsel faces particular difficulty when it is expected that the defendant will present an affirmative defense. Affirmative defenses raise issues that go beyond the plaintiff's own case. Accordingly, if you are plaintiff's counsel, you must decide whether to ignore the affirmative defense and lose the opportunity to reply to it until later in the case, or respond to the defense in advance. If you choose to address the affirmative defense in your opening, be sure to avoid getting the jurors fixated on the negative aspects of your case. Reject the affirmative defense quickly and for a solid reason. Be firm, unapologetic and straightforward. If you seem overly concerned about the defense, it will suggest to the jurors that you have a weak case.

Another tough question for plaintiff's counsel is whether to address damages. Generally, asking for specific damages in the opening statement is premature, and may turn off the jury. Save it for closing, when the jury will be entirely convinced of the defendant's misconduct and ready to consider the financial consequences.

Defendant's counsel faces different issues when delivering their opening statement, caused by the advantage and disadvantage of going second. If you are defense counsel, by the time you begin your opening statement, both you and the jury will have listened to the opening by plaintiff's counsel. The jury will be waiting for your take on the dispute to which they have just been introduced. After all, the plaintiff's opening statement is essentially an accusation, and the jury will be wondering if the plaintiff's allegations about your client are true. As defense counsel, you must respond with a clear denial, as anything short of a denial will be seen as an admission of fault. It is also important that you respond, to some extent, to the plaintiff's version of the evidence. Simply telling your independent version of the story is not sufficient, as that will not help explain why the facts that support your version of the story are superior. Instead, as you set forth the evidence in your opening statement, note on occasion how the evidence contradicts the plaintiff's theory of the case (without crossing the line into argument). For instance, "Plaintiff's counsel told you that Ms. Clark did not have an adequate opportunity to improve her job performance. But in this case, you will see no less than five performance

reviews, over a period of five years, in which Ms. Clark was specifically advised to pay closer attention to deadlines."

Additionally, it is perfectly permissible to point out evidentiary gaps in the plaintiff's opening statement, and if appropriate to your case, you should do it. For example, "Plaintiff's counsel accused my client of sending her offensive e-mails every day for six months. Where are those e-mails? In this trial, plaintiff will not have even one e-mail to show you."

Finally, defense counsel must respond to comments concerning the credibility of defense witnesses. Silence may be seen as a tacit admission. Use the opening to protect and defend your witnesses, by introducing them to the jury with facts that demonstrate their integrity, trustworthiness, and/or lack of bias.

Omissions by the Other Side

Listen for what is missing from opposing counsel's opening. Is there something opposing counsel is afraid of? Is there a "bad fact" that opposing counsel intentionally avoided discussing? Often, the silence may provide more clues about opposing counsel's plan for the case than what is actually discussed. Use the omissions to help you strategize as the case proceeds.

Discussing the Law

The judge will explain the legal questions for the jury's consideration when the jury instructions are given, usually at the close of the evidence or after counsel's closing arguments. Thus, the opening statement generally is not the time to tell the jury what legal questions will be the subject of their deliberations. Sometimes, however, a lawyer must reference legal questions in the opening statement to give the jury some context for the subject of the trial. For instance, a lawyer may tell the jury they will be asked to decide what kind of conduct constitutes sexual harassment, or whether a company's response to a harassment complaint was sufficient. As long as the legal questions are broadly framed, the judge likely will allow the lawyer some latitude.

Exaggeration

The opening statement should be straightforward and direct. Avoid exaggerating or misstating the facts, and don't overdo the emotion. If a lawyer relies on exaggeration to appeal to the jury, he or she will certainly hear about "broken promises" in opposing counsel's closing arguments. Moreover, counsel should remember to be sensitive to any issues which the jury may find uncomfortable, and should avoid attacking witnesses too harshly as they are described. Jurors may react with sympathy for the witnesses, and might hold it against the lawyer and, consequently, the lawyer's client.

Nonetheless, a lawyer should not be afraid to use exaggeration to his or her advantage. Sometimes, for example, reading from the other party's own pleadings is helpful if the pleadings

have exaggerated the facts, and the opposing party will never be able to prove the statements they have made.

Movement

Your opening statement may be more forceful and effective if you move about the courtroom during your delivery (assuming the court's rules do not restrict you to a podium or table). Movement can be used to transition from one topic to another, or to emphasize a particular point. For example, to highlight a change of subjects during the opening, take a step or two to the side, and pause. This will signal to the jury that one subject has ended and another is about to begin. The motion also will refocus the jurors' attention on you if their mind has temporarily wandered.

Deliberate movements also can attract the jury's attention and emphasize an important point. Should you want to stress a critical fact, take a few steps towards the jurors. The faster and more purposeful your movements, the more emphasis is placed on the point you are making. Use a transition sentence while moving toward the jury, then come to a stop, and deliver the important point while standing still. The contrast will emphasize the point.

Too much movement can be ineffective, however. Don't move so much that the jury notices your movement more than your words. Do not run, and do not hover over the jurors. The invasion of their space may be seen as threatening, claustrophobic, and overbearing. Also, don't pace. Pacing distracts the jury and deprives the lawyer of the ability to use movement for emphasis.

Do Not Read Your Opening

Do not read the opening statement. You must become comfortable talking directly to the jurors, as there is little more uninspiring and dull than a lawyer who reads the opening statement. While reading the opening may help you avoid forgetting any of your points, and may ensure smoothly flowing sentences, an opening that is read is essentially a waste of time, as the content undoubtedly will be overshadowed by the poor delivery. Jurors want to see a lawyer's concern and familiarity with the case. Relying on a script conveys the opposite – a lack of true belief in the case, and a lack of familiarity with the events at issue. Notes in outline form are a different story, however – notes may be referred to in between pauses without dampening the effect. Moreover, it may be helpful to write out the opening statement in full during the preparation stage, and practice delivering it from the script, getting progressively less and less reliant upon the written words. When the real moment comes, however, a lawyer should put the script away. Don't even bring it to the courtroom, as you may be too tempted to use it.

Look at the jurors while making the opening statement, and show them you care about your case, and what they think. Connect with all of the jurors – don't just focus on a select few, no matter what reactions you are getting. Jurors will appreciate the attention and interaction, and will be more receptive to your presentation. Do not forget the importance of a friendly demeanor. Do your best to give the jurors a favorable impression of you as a person, in addition

to you as a lawyer. Don't be afraid to laugh at your own mistakes, if you misspeak or fumble with your words for a moment. Jurors generally appreciate lawyers who are humble, and do not take every single moment seriously. Moreover, jurors, like most people, do not like hostility and anger. Lawyers who demean, insult, or bait the other side are inviting the jury to dislike them, and to extend sympathy to the other side. Acting courteously toward opposing counsel, witnesses, the judge, and courtroom personnel is never a mistake.

Bench Trials

Lawyers often agree to waive the opening statement in bench trials, but waiving the opening generally is not a wise move. Just like jurors, a judge needs an overview of the case before the evidence is presented, so that the evidence will have some context. Thus, unless the case has been assigned to the same judge for a long time, and you are certain the judge (and the judge's clerk) knows your case extremely well, do not waive the opening – just make it shorter and less dramatic. Also, feel free to address more law during your opening in a bench trial. Clarify for the judge what legal questions will govern the case, and what standards the judge will need to apply.

III. Concluding Your Opening Statement

A simple, smart way to conclude your opening is to tell the jury exactly what you would like from them at the end of the case: "After you've heard all the evidence, we will ask you to return your verdict for the plaintiff, Sally James." Such an ending may not be dramatic, but it gets your ultimate point across effectively. Or, consider ending with an expression of thanks for the jurors' time and attention. If you can do it sincerely, a statement of gratitude may be the best way to curry jurors' favor before you embark upon the next stage of the trial.

Above all else, conclude confidently, and with an unambiguous message. Leave the jury with a clear understanding of your client's position in the case, a basis for believing your side, and an appreciation for their role in the rest of the trial.

STAND AND DELIVER: THOUGHTS ON CONSTRUCTING AND PRESENTING FINAL ARGUMENT

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I. Generally Applicable Law of Final Argument

a. Procedure

i. Typically, there is a right to argument in a jury trial by common law or statute
ii. Argument in a non-jury trial is discretionary
iii. Time limits are discretionary

b. Scope of permissible argument

i. There are numerous "Thou Shalt Not" rules, such as:

- Personal belief or knowledge
- Golden Rule
- Appeal to passion and prejudice
- Attacks on character or motive
- Settlement offers
- Insurance
- Reference to excluded evidence
- Appeal to bias

ii. Otherwise, final argument is limited only by skill and imagination

- Wide latitude is given
- Discuss all reasonable inferences from the evidence
- Appropriate (some would say necessary) to discuss the law
- Damages
- Credibility
- Common knowledge

c. Objection is necessary to preserve error for appellate review

II. Construction of the Argument

a. List the "blocks" or "chapters" of the argument – big topics – and give each chapter a descriptive title (three is good, seven is too many – make it manageable and focused)

b. For each chapter, list every piece of evidence that supports both testimony and exhibits. Some bits of evidence support more than one chapter.

c. Develop a complete argument for each chapter – with each chapter having a beginning, middle and end. Jettison those pieces of evidence that do not fit.

d. Decide on the order – both as to chapters and elements of the chapter story – and discard those items that do not fit.

e. Spend time making each chapter story persuasive. Evaluate each chapter of the argument for consistency, weakness and persuasive effect.

    i. Work on rhetorical devices:

        - Metaphors and analogies
        - Alliteration
        - The rule of three
        - Use of silence, volume, pace, staging and use of your body

f. Create headings and transitions and maximize their persuasive effect

g. Decide on the first few words

h. Decide on the last few words

i. Practice

j. Reduce to outline form or bullet points

III. Practical Tips and Tactical Choices

a. Insist on a record

b. Require the presence of your client – absence is construed as disinterest

c. Preparation – at least the basic outline of final argument should be done early in the case, modified as the case develops and then put in final form with adjustments from trial

d. Start with what matters to the outcome

e. Maintain credibility

   i. Do not overstate
   ii. Do not mock, belittle or be sarcastic

f. Address unfavorable evidence

g. Integrate closing with what happened at trial – voir dire, opening, etc.

h. Use the exhibits and demonstratives

i. Discuss missing evidence and witness credibility

   i. Credibility is often fundamental to outcome
   ii. Understate and let the jury decide
   iii. Beware of improper credibility arguments

j. Make concessions as may be necessary

k. Discuss important instructions

l. Discuss damages – even on the defense side – and discuss those things that cannot be considered (this needs a discussion with the Court) such as attorney fees, effect of taxation, grief and sorrow of survivors in a death case, etc.

m. Truly rebut the other side's closing but do it succinctly – pick the most important things

n. Call out overstatement and failure to deliver on promised evidence from opening

o. Use daily transcripts to discuss important testimony

p. Take the jury through the verdict form and tell them – explicitly – what verdict you want

q. End with something that matters to the outcome

IV. The Fundamental Purpose Is Persuasion

a. The objective of final argument is to persuade – and there are three audiences:

    i. Jurors already in your favor need ammunition to fight for your side in the jury room
    ii. Jurors who are undecided need to be persuaded to your point of view and be given ammunition and reasons to stay there

iii. Those jurors already against you need to be kept from further entrenchment and be given reason and permission to change their mind

b. The attributes of persuasion are

i. Structure – a "thematic anatomy" (credit to William Safire)
ii. Theme
iii. Purpose
iv. Focus
v. Phrases – "If it doesn't fit, you must acquit"
vi. Delivery

c. Ethos, pathos, logos or all of the above

i. Ethos is the ethical appeal – designed for the credible, fair and unbiased approach
ii. Pathos is an emotional appeal – evocation of sorry, pity and empathy
iii. Logos is an appeal to logic, designed to convince an audience by use of logic or reason

d. Each of the three – ethos, pathos and logos – has its place based on:

i. Facts of the case
ii. Your own style
iii. The jury and jurisdiction

"Justice is the greatest interest of man on Earth. It is the ligament which holds civilized beings and civilized nations together." Daniel Webster

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Voir Dire

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Assessing the challenge of juror bias in post 9-11 courtrooms

Using Demonstrative Exhibits and Other Aids in Trial

By Thomas M. Melsheimer and The Hon. Craig Smith

Editor's Note: Two longtime trial lawyers — one of whom is now a district judge — have written On the Jury Trial: Principles and Practices for Effective Advocacy. *Included in the book is the Forward, which was written by Royal Furgeson, a retired U.S. District Judge and Dean of the University of North Texas in Dallas College of Law. The book includes topics related to voir dire, opening statement, preparing witnesses, cross examination, using exhibits, closing argument, and jury research. In addition, the authors address the state of the jury trial in America and how it is under attack from a number of fronts. Their premise in the book is that preserving the skills of trying a case effectively and efficiently will support the preservation of the jury trial. The following is an excerpt for the book. It is reprinted with permission from the publisher, The University of North Texas Press, Denton, Texas*

The ability of lawyers to use computer-aided graphics in a presentation in front of a judge or jury is one of the single most important advances in trial advocacy in the last 50 years. When we started practicing law, a lawyer was lucky if the courtroom had an old chalkboard, let alone a paper flip chart, to illustrate a point to the judge or the jury. Today, many lawyers come to court with a laptop and some form of projector, often supplied by the court itself, to illustrate or emphasize something important.

There can be no doubt that using electronically projected "slides" can be an effective tool in presenting evidence. In a case involving a key clause in a multi-page contract, for example, being able to focus the jury's attention on the clause, repeatedly, can be very effective. Indeed, without such an ability, the jury may never be able to understand fully the importance of the language. However, we have also found that electronic presentations can become something of an unnecessary crutch, or worse, a distraction to the presentation of compelling arguments. So we lay out below some do's and don'ts with respect to demonstrative exhibits generally, with a particular emphasis on electronic presentations.

Do Hire a Good Professional Firm to Assist with Your Case, if You Can Afford It

Lawyers are trained in reading cases and understanding statutes. They are not trained, very much, in how to use computer tools to make presentations. That is why a good trial graphics firm can be very useful. Not every case will justify the expense and, for reasons we explain below, sometimes "less is more" in this area. But if you have a case of more than modest complexity—even a multi-car traffic collision may qualify or a premises liability case—consider hiring a trial graphics firm to assist you. Skilled consultants are not in abundance in any legal community and you need to ask other lawyers for recommendations. Jason Barnes of Dallas is a pioneer in the field and one of the best in the business. Like lawyers and experts, these consultants typically charge by the hour and, also like lawyers, if left unchecked and unguided, can run up a substantial bill. So it's important that you have clear direction in mind of how you want them to assist you and what the budget will be, which should be agreed to in advance.

Do Identify the Key Pieces of Evidence You Think You Want to Highlight or Emphasize

The process of identifying your key evidence is important regardless of how you intend to present it, of course. But, when thinking about how to visually present your evidence to the jury, the kind of evidence you are considering is important. Is it a written document, like a contract or an email string? In that circumstance, simple highlighting or a "blow out" of text is sufficient. If your key evidence is an accident scene or a piece of equipment, you may decide that a professionally taken photograph from a variety of angles or even a computer animation is what is needed.

Sometimes form can matter as much as substance. Whenever you present something to the jury, you want it to "look good." An uneven hand-highlighted poster board may convey the same information as a slickly done electronic version but you will not have met the jury's expectations in today's world. Jurors from all walks of life are used to seeing slick electronic presentations and some even use them in their own jobs. In our experience, jurors expect a certain level of craft in visual presentations and the trial lawyer must account for that.

Do use a timeline but don't overdo it

It is the rare case that will not benefit from an organizing timeline of key events. If every trial is in some sense a story of something that happened to someone, a timeline is a way of organizing the story in a way that the jury can remember.

The use of timelines in court well predates the use of computers and projectors, of course. Physical "boards" with a horizontal axis upon which events are placed have been effectively used for decades. This is one type of demonstrative evidence where the computer may not always be an advantage. In a case where "when" something happened is important— almost every case—the ability to have a physical board in front of the jury for long stretches of testimony across multiple witnesses (assuming the judge will permit it) can be very effective at fixing the chronology in the mind of the jury, even more so than one that is electronically projected on a screen.

A key advantage of an electronic timeline is that it can be modified quickly and easily to reflect the actual evidence admitted in front of the jury. A pre-fabricated board can be problematic if the evidence about various events does not come in the way you anticipated.

Whatever kind of timeline you use, it's critical that you avoid chocking it full of too many entries. This is easier said than done. Once you commit yourself to doing a timeline of key events, you will often find yourself saying, "Here's another important date." It's like clearing out your attic for a garage sale. As long as you are having one, maybe it's time to get rid of that old bookcase and that suit you haven't worn in ten years.

But a cluttered timeline is worse than none at all as it will distract the jury from appreciating the key events. For example, in a product liability case involving an allegedly defective medical device, the plaintiff built an enormous wooden board that was six feet long and nearly five feet high. It dominated the small courtroom. Crammed full of information, color coded and icon rich, it was an example of "more is less" as it became a distraction rather than a learning tool.

A good rule of thumb is this: you ought to be able to have few enough entries so that, at the distance between the display and the jury, every entry can be easily seen. The number of entries will vary by the size of the time period covered, of course, and by the display format used.

For example, if all the key events occurred in a single month, a timeline in the form of desk-top calendar page can be effective. If the events stretch out over a year or more, you are likely going to be wed to a horizontal axis format. Either way, it's important that you convey the least amount of information necessary to make your point or the timeline will become a useless distraction for the jury. At the end of this chapter, we have provided some examples of very effective timelines.

Don't Make Visual Aids an End to Themselves

There is a Goldilocks rule that runs through almost every aspect of trial advocacy. Too hot, too cold, and just right. This is certainly true with demonstrative aids.

Although the use of computer display programs, like PowerPoint, can be very useful, they can be, and often are, overdone. Too many opening statements today are stuffed to the gills with PowerPoint-type slides that simply repeat every point the lawyer is making. That's not an effective use of demonstrative aids. And more than just ineffective, the overuse of such slides, sometimes called "Death by PowerPoint," can lose the jury's attention, confuse them, and undermine the advocate's credibility.

There is no particular rule of thumb here about the use of such slides. What is too hot in one

situation is just right in another. But it's useful to ask yourself, about every slide in your deck, a few simple questions: Does it truly enhance an important point that I need the jury to remember? Might the same point not be made with a bit more emphasis in your voice? Or slowing down? Or repeating it? If so, then you don't really need the slide. This kind of exercise needs to be done repeatedly until you have cut back what you can, just as if you were editing a brief.

Putting the PowerPoint phenomenon aside, the problem of demonstratives for their own sake has another downside. They can backfire. In the ground-breaking terrorism financing case brought against Arab Bank by renowned Texas trial lawyer Mark Werbner and others, the defendant had to deal with an order from the court that allowed the jury to make an adverse inference against the bank.

The jury could infer that the bank's failure to produce certain documents meant that the unproduced documents would show a connection between the bank and the financing of terrorist attacks in Israel. The bank lawyers, in an effort to illustrate how many documents they did produce, used a demonstrative of a skyscraper (an odd choice in itself) to illustrate that, if all the documents the bank had produced were stacked on top of each other, the documents would be the size of a very tall building.

It certainly sounds like a clever and memorable way of making a point. But it was a demonstrative that could be easily twisted by the other side. And so it was. The plaintiff's counsel pointed out that, although the documents produced may stretch to the sky, what the jury wasn't seeing was all the key evidence in the basement of that very same building.

One of us prepared the trial of a case as a very young lawyer in which the client defendant, in an effort to show his houseguest an antique shotgun, accidently shot the guest at close range. A highly realistic demonstrative was prepared, at great expense, of the room where the shooting occurred, complete with scale model dolls of the shooter and the unsuspecting guest. These could be posed in different positions and stuck to the floor with Velcro. It looked great. But what did it accomplish? To make the inarguable negligence of the defendant even more real to the jury? The case quickly settled.

We all get excited about demonstrative evidence. It's like a creative lab for trial preparation. The software available today to create compelling visual aids is truly remarkable. For jurors under 40 especially, the use of advanced digital technology to illustrate a point will be especially resonant. How about the timeline that, when you click on an event, a key deposition excerpt plays? Or an animation that shows the defective weld shattering at the point of impact? Or a word cloud highlighting the frequency of particular terms in a contract? These kinds of things can be effective tools for advocacy. But they must be road tested to see if they can be easily turned around to make a point for your opponent. Further, you should ask yourself if you truly need to make that a point and if it could be made more simply and memorably another way.

Don't Forget About the 'Old-Fashioned' Approach

We've discussed the notion of using computer programs like PowerPoint or Trial Director to display. and highlight evidence in trial and we certainly endorse those kinds of programs. In this digital age, juries have come to expect that kind of evidence. But does that mean that every point worth making in a trial is worth making with aid of a computer? Or that a trial cannot be conducted without one?

Certainly not. Although we are firm believers in the merits of using technology to assist in trial presentation, you may not always have technological resources at your disposal. And even when you do, sometimes the use of a flip chart or a chalk or dry erase board can be very effective.

In the direct or cross examination of a witness, for example, it is sometimes useful to make a list for the jury—a list of participants to a meeting or a list of important dates. That sort of evidence can be effectively emphasized by the lawyer simply writing the list on the white board or flip chart, having the witness vouch for its accuracy, and then marking it on the fly for use as a demonstrative, perhaps later in the evidence or during closing argument.

The use of on-the-fly demonstratives can have significant value beyond their low-tech appeal. Usually, the parties will have agreed (and indeed should agree) to some sort of procedure for an exchange and review of demonstrative exhibits before they are used in front of the jury. This is a sensible way of avoiding objections in the middle of the evidence and the need to involve the court in a ruling, which might end up with the demonstrative you planned your examination or argument around being excluded. But demonstratives created on-the-fly—live in court—are usually exempt from any rule of disclosure. Of course, the other side can object to anything you create but will often hesitate to do so for fear of emphasizing the point to the jury or otherwise appearing concerned or fearful about the evidence that is the subject of the demonstrative.

Re-Use and Emphasize Demonstratives Throughout the Case and Especially During Closing Argument

Whether your demonstrative is a slick electronic one or a handwritten chart, don't use it and forget it about. Look for ways to reuse the demonstrative with another witness, for example, to emphasize an important point.

In preparing closing argument, review the demonstratives you have used in the trial. If they have truly illustrated key or important points, those demonstratives may help you organize your argument. They can also be effectively re-used in closing to emphasize your best arguments.

Look for Ways to Use the Other Side's Demonstratives

Taking the other side's demonstratives and using them to make a point in your favor can be extremely effective. In fact, you should look to do this at every opportunity. The Arab Bank case presented one example of this approach. It may simply involve

having one of your witnesses explain why the demonstrative is incorrect or misleading. Better still if you can get one of the other side's own witnesses to do so, or to at least undermine it in some way. But recognizing the benefit of doing this should also help you recognize the risk for your own demonstratives. Make sure they are scrupulously accurate and try to imagine ways they could be misconstrued and, if necessary, adjust them.

The process of road testing a demonstrative is somewhat like what we recommend you do with any analogy you plan to use at trial. Analogies, like demonstratives, can be very effective tools for persuasion. They can create an "aha" moment, a sense of recognition that leads a jury to say, "Yes, that's right, I agree with that."

But analogies can also be risky if they do not precisely fit the circumstance. Sometimes, it is better to avoid an analogy all together and describe what a thing is, as opposed to what it is like.

Similarly, not every point of proof in trial is appropriate for a demonstrative. Describing something in words can work just fine without creating much risk of your adversary turning them against you.

Examples of Timelines

To the right are two examples of timelines used in actual jury trials. They are not particularly fancy or complicated but they provide a guide for the jury for understanding the evidence and how it fits into one side's theory of the case. In the first timeline, a dispute about the division of an estate, the timeline not only highlights certain events but it also links changes in the will to various actions by the beneficiaries. In the second timeline, a simple approach is taken to the key events in the prosecution of a series of patents, an important foundation for most patent litigations.

Demonstrative Exhibits Checklist

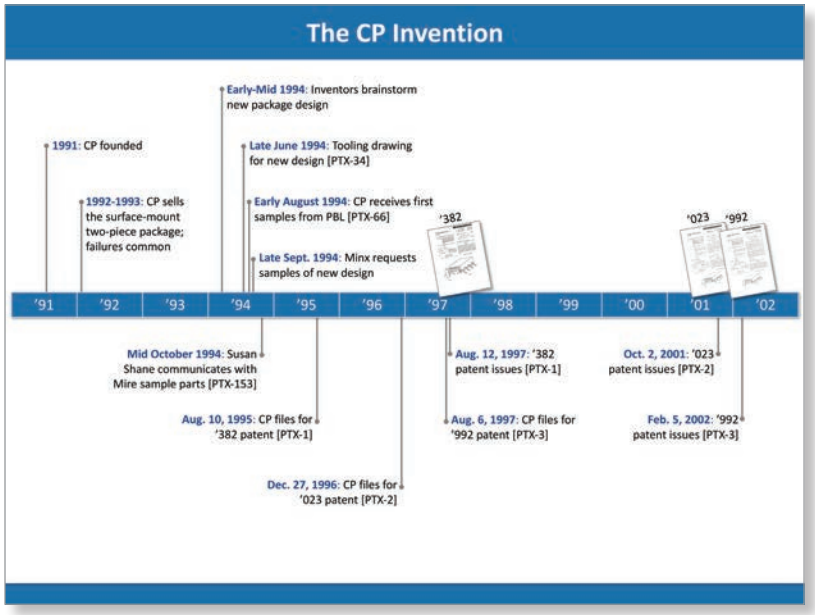
1. Use an experienced graphics firm if your client can afford it. Slick and memorable graphics can help you win your case. But so can old-school unsophisticated demonstratives.

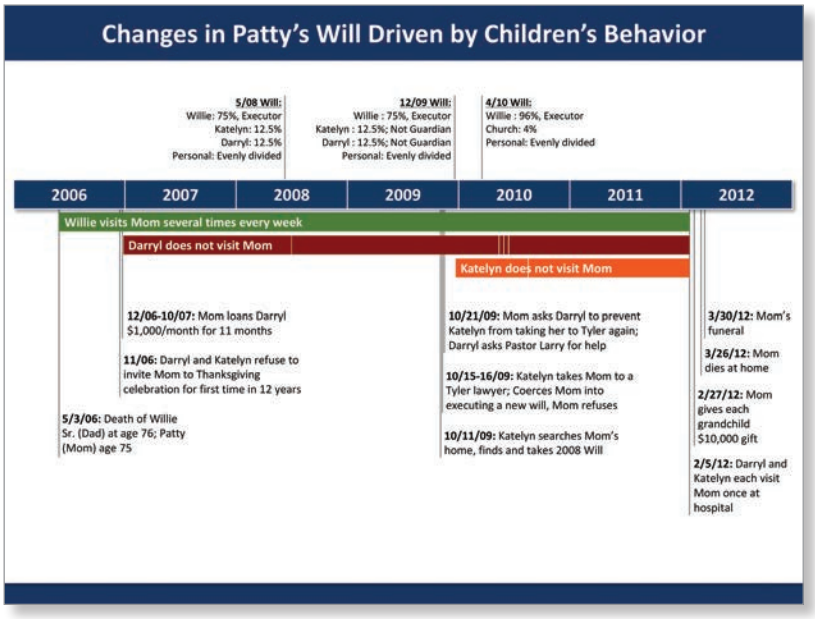
2. Each demonstrative should have a clear purpose in advancing a theme or argument. If it doesn't, cut it.

3. Road test your demonstratives with other members of your trial team to make sure they cannot be turned around and used against you.

4. Look for ways to use the other side's demonstratives to illustrate a point favorable to your case. ■

Examples of Timelines





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