

INCORPORATING MEMORABLE DEMONSTRATIVES INTO OPENING STATEMENTS

By Josh Dubin, Esq.

Our attention spans are getting shorter. Although scientists debate the reasons, as well as the short and long-term impact on our society, there can be no question that it is more difficult than ever to hold people's attention. Whether it is the person feverishly thumbing through messages on a smartphone and not listening as someone tries to explain something, or the juror that cannot make eye contact because he has started to think about emails he needs to check at the lunch break, the evidence of this phenomenon is ubiquitous. In addition to the diminished ability to listen, the way we learn has changed dramatically over the last 20 years. The advent of the Internet and the insinuation of visual media into every facet of life via mobile devices have transformed the way people receive and process information.

The foregoing trends have serious implications for trial lawyers. If a lawyer is not complementing her oratory with demonstrative aids, she is not speaking to jurors in the most recognizable or compelling manner. While learning through pictures is not a new concept, a growing body of research in various fields of psychology suggests that people absorb information more comprehensively through a combination of verbal communication and visual stimuli. Moreover, research at the intersection of social psychology and the law suggests that the presentation of visual stimuli during opening statements improves an attorney's ability to communicate with and persuade the jury. Thus, the extent to which visual aids are effectively incorporated into the opening statement can greatly impact the case as a whole – as that is the first and sometimes only opportunity for the lawyer to convince certain jurors that she is

credible, can communicate clearly, and that the prosecutors may not have what it takes to get a conviction.

THE OPENING STATEMENT

Why do first impressions matter? The opening statement is the defense attorney's most critical opportunity to shape the jury's view of the client and the case. The first impression the jury takes away from the opening statement has the power to lay the foundation for the remainder of the trial – crafting a lens through which jurors will view subsequent information presented by both sides. While this concept has been engrained in lawyers' minds since law school, many are unaware of the science behind the reason first impressions are so critical in the context of a trial.

The power of first impressions is backed by extensive literature. Upon the discovery of a phenomenon known as the “primacy effect” by Solomon Asch,ⁱ social psychologists began to explore the reasons why first impressions are so powerful. Researchers have found that once people form an opinion or develop a theory, even one based on incomplete or inaccurate information, they are far less likely to change their minds when later confronted with contradictory information. At the beginning of a trial, jurors are more attentive, engaged, curious, and open-minded; as the trial continues and jurors are bombarded with tremendous amounts of information, their minds naturally grow more tired, overwhelmed, and disinterested. Consequently, they begin to process and remember this secondary information to a lesser degree.

Additionally, psychologists have found that a phenomenon known as “confirmation bias” corroborates the idea that information is more influential when it appears earlier rather than later. Studies of confirmation bias have shown that after individuals form an impression, they tend to discount or reject any additional facts that challenge their established view / theory. Therefore,

jurors are likely to process information learned later in the trial *in the context of* the opinion they already formed based on information they learned during opening statements. Jurors do change their minds. The research, however, underscores the importance of the defense attorney leveraging all available resources to ensure that his first impression is as persuasive as possible.

A PICTURE IS WORTH A THOUSAND WORDS

Some attorneys resist using a demonstrative aid during their opening statements because they do not want to appear “slick” or “fancy,” or because they want the jury to focus on “me and what I have to say, not a picture or a chart.” Their reactions are based on a fundamental misunderstanding of modern times, juror decision-making, and human psychology. The importance of implementing demonstrative aids cannot be overstated. Studies have shown that the difference between auditory and visual processing is, in fact, quite drastic. This constitutes a potentially dangerous finding when applied to cases involving long trials, a foreign concept, or complicated information.

In a study conducted by Michael E. Cobo, scientists found that on average, humans retain only 15 percent of information received from audible sources. Interestingly, they found that retention climbs to 65 percent when the information is delivered *visually*.ⁱⁱ Similarly, a second study by Robert F. Seltzer found that the average person retains 87 percent of information presented visually, but only 10 percent of information presented orally.ⁱⁱⁱ

Extensive controlled experiments support the notion that visual technology has a strong effect on juror decision-making. A recent study (by Jaihyun Park and Neal Feigenson) that compared opening arguments delivered with and without simple PowerPoint visuals found that mock jurors were persuaded more often when an attorney used visuals. The use of visual aids correlated not only with level of juror persuasion, but also with recollection of evidence and

perceptions of the advocates.^{iv} For example, the study found that the percentage of jurors who found the defendant guilty was highest when the prosecution employed visual aids but the defendant did not. When the defendant used visuals and the prosecution did not, the percentage of jurors who found the defendant guilty dropped significantly. The study also found that the implementation of demonstratives produced heightened accuracy and memory when jurors were asked to recall specific statistical evidence relating to the defendant. Finally, the research showed that when the defense attorney used visual aids, jurors perceived the attorney as better prepared, more competent, and more credible. As exemplified by Jaihyun Park and Neal Feigenson's study, an attorney's use of visual aids at *any* point in a legal presentation can provide a clear advantage, making the incorporation of such visuals during the opening statement's critical window of importance particularly key.

INCORPORATING MEMORABLE DEMONSTRATIVES

When deciding what demonstratives to create for an opening statement, the defense attorney should determine the two or three main messages he hopes to send to the jury. For instance, in a murder case, it is often necessary to establish that the defendant had no motive or opportunity to commit the crime. In an insider trading case, convincing jurors that the defendant had no access to confidential information and showing them that whatever information he did possess was in the public domain are typically critical. When a case involving wiretaps, it is often important to convey from the outset that words spoken by a government informant can be interpreted in several different ways. When various eyewitness accounts of a crime will be presented, emphasizing the inconsistencies in their various renditions is typically very effective. Regardless of the case, the defense attorney should always craft his opening demonstratives in terms of the two or three things he wants the jury to remember.

It is also important to keep in mind that one of the most common areas in which jurors struggle is temporal associations, *i.e.*, chronology. Results from jurors' post-trial interviews and mock trial exercises suggest that jurors often struggle with how a party's argument fits into the timeline of events. Given the many dates involved in a case, the dual-narratives (*i.e.*, the prosecution's version of events versus the defendant's), and the differing views on which dates are most significant, many jurors find themselves temporally adrift in the evidence. Practitioners, often take this for granted because, by the time trial begins, they have internalized the key dates to the point that the dates seem like second nature. Therefore, a timeline is one of the most commonly used and effective visual aids in opening statements. Lawyers should always consider incorporating a timeline into their opening statements, as research has shown that it will make their message more interesting and will decrease the likelihood that jurors miss key arguments due to confusion about the timing of the events at issue.

EXAMPLES OF EFFECTIVE OPENING DEMONSTRATIVES

The following are examples of effective demonstrative aids used during opening statements:

United States v. Mark Holzwanger and Andrew Muhlstock. Edward Sapone tried this case in the U.S. District Court for the District of New Jersey. The defendants faced three counts of wire fraud. The government alleged that the defendants, who were partners in an accounting firm, engaged in a scheme to defraud clients of another payroll company they owned. In essence, the government claimed that Mr. Muhlstock must have known that the payroll company was diverting funds that were owed to the Internal Revenue Service because (1) he was part owner of the payroll company and (2) it shared office space with his accounting firm.

The key message in Mr. Sapone's opening statement was that Mr. Muhlstock's focus

was, and for his entire professional life had always been, performing accounting work. Although he was a part owner of the payroll company, he functioned more like an investor. In addition, the fact that he was an accountant did not mean he knew anything about the intricacies of the payroll business. To stress these points, Mr. Sapone created a timeline that focused on the defendant's career as an accountant, with his investment in the payroll company being but one entry on the timeline. He also created a simple chart that juxtaposed the work of a certified public accountant against that of a payroll company. The case resulted in a hung jury. After the trial, the judge granted Mr. Sapone's post-trial Rule 29 motion seeking a directed acquittal of all charges. The double jeopardy clause barred a retrial.

United States v. Samuel Levis. This case was tried by Roy Black in the Southern District of New York. Mr. Levis was an executive at Doral Bank, which purchased and then sold pools of residential mortgages to investment banks. Prosecutors accused Mr. Levis of securities fraud in connection with statements he made to analysts regarding certain protections Doral Bank received in its contractual arrangements with banks from which it purchased pools of loans.

Like many cases in which the subject matter will be foreign to most jurors, Mr. Black thought it critical to ensure that jurors understood the reason banks purchase loans from other banks, and how that process creates liquidity on the marketplace. Part of the objective was to normalize this process by depicting Fannie Mae and Freddie Mac as synonymous with the investment banks that purchased packages of mortgages from Doral. The demonstrative illustrated how a bank's lending reserves eventually become depleted as they continually extend mortgages to homeowners. The reserve only becomes replenished when packages of loans are sold – thereby enabling banks like Doral to continue extending mortgages to new homeowners.

VOOM HD Holdings v. Echostar Satellite. Orin Snyder of Gibson Dunn & Crutcher

tried the *VOOM* case in the Southern District of New York in 2012. This breach of contract case arose out of the improper and wrongful termination by EchoStar of a multi-billion dollar, 15-year distribution agreement with VOOM HD (VOOM HD is a subsidiary of Rainbow Media, which in turn is a subsidiary of Cablevision). The defendant EchoStar owned the DISH Network. The DISH Network is the second largest company in the United States that distributes television programming to customers by way of their satellites. VOOM HD owned and operated a suite of 15 HD channels known as VOOM. This was a revolutionary idea at the time because not many channels were offered in HD and VOOM was the largest package of all-HD channels on the market. In an agreement between the parties, EchoStar obtained the right to distribute the VOOM channels to its DISH customers for 15 years.

Under the contract, EchoStar would pay VOOM a fixed amount for every DISH subscriber that received the VOOM channels. The parties had a simple formula by which they could calculate the amount that EchoStar had to pay VOOM each month from 2005 through 2020. They would simply take the total number of DISH HD subscribers that were receiving VOOM for any given month and then multiply that amount by the per subscriber fee for that year. As part of this deal, VOOM HD agreed to invest \$500 million in the VOOM “service” at a rate of \$100 million per year over the first five years of the contract. Less than two years into the deal, EchoStar determined that the agreement was no longer profitable and as a result attempted to walk away from the contract, claiming that VOOM failed to meet its contractual obligations.

Like many breach of contract cases, Mr. Snyder thought it was critical in the opening statement to give jurors a brief overview of how VOOM came to be, and the circumstances surrounding VOOM and EchoStar entering into a partnership. This was important because it gave jurors a sense of the parties’ mindsets going into the deal, their expectations, and why

EchoStar’s position in the case was inconsistent with their state of mind when negotiating the deal. Part of the objective was to show that while the VOOM channels and VOOM satellite were a new and innovative venture, they had the advantage of being part of an established and successful family of business, including Cablevision and Rainbow Media. VOOM reaped enormous benefits and enjoyed economies of scale by being part of the Cablevision and Rainbow Media family of companies.

The demonstrative illustrated how Cablevision and Rainbow Media already had accounting, human resources and legal departments, as well as studios, office space, and equipment such as lighting and cameras and post-production facilities. Instead of having to start from scratch, VOOM was built to share departments, facilities, and equipment with its parent companies, and to benefit from the expertise of executives and other employees already working for Cablevision’s companies.

PRACTICE POINTS

Neither the Federal Rules of Evidence, nor the vast majority of state court evidentiary rules directly address the use of demonstratives during opening statements. As a practical matter, most judges in both state and federal courts allow the use of at least some demonstratives during opening statements. However, the extent to which defense counsel is permitted to employ the use of visual aids is an area of wide judicial discretion. Some judges make a distinction between documentary evidence that the parties reasonably expect will be admitted into evidence throughout the course of the trial as opposed to charts, graphs, and other analytical demonstratives aids – allowing the latter, while prohibiting the use of what they consider documentary “evidence.” Other judges allow both, with the caveat that showing the jury

documentary evidence during the opening statement carries some inherent risk. Consider the following sentiments from Judge Castel in the Southern District of New York when instructing the parties about their use of demonstrative aids during opening statements in a complex insurance case: *“Now, if somebody is going to show a document [during opening] . . . to which an objection has been raised . . . it doesn’t preclude its use during opening unless I conclude there is only a highly remote possibility that it would get into evidence and that there would be great prejudice from its use. But I’m not going to be ruling on admissibility of exhibits. The jury is going to be charged that opening arguments are not evidence . . . And I assume you’ll have a field day [during your summation] if they try to use a document or do use a document, and it doesn’t come into evidence, you’ll have fun with it.”*^v

Judge Castel’s comments stress the importance of lawyers researching the rules and practices of the judge before which they are trying their cases. Because the use of demonstratives during opening statements is a matter of judicial discretion, the practices of judges vary widely from courtroom to courtroom. NACDL’s listserv is an effective tool for inquiring about how a particular judge has handled the issue in the past. Further, defense counsel should always check the judge’s individual rules of practice. Most judges will require defense counsel to exchange demonstrative aids with the prosecution prior to the opening statement. Thus, defense counsel must ask the court whether the judge requires an exchange of demonstrative aids and the deadline for any such exchange. For example, some judges require an exchange to occur at least 24 hours prior to opening statements. Most judges do not require defense counsel to provide the prosecution with the defense’s demonstratives in the precise order that counsel will show them to the jury. Therefore, it is advisable for defense lawyers to “shuffle the deck,” to avoid telegraphing the sequence of their arguments.

Finally, because the rules of evidence do not specifically address the use of demonstratives during opening statements, counsel may be asked by the court to provide the legal basis for being able to use them. The following sources are instructive: Charts or calculations that summarize otherwise admissible data should be admissible pursuant Rule 1006 of the Federal Rules of Evidence. In addition, the Federal Judicial Center's *Manual for Complex Litigation* encourages the use of technology in the courtroom, and in particular it urges the use of demonstrative aids during openings is such demonstratives would "aid jury comprehension." Moreover, some state courts allow the use of demonstrative aids during opening statements for similar reasons. For example, in *People v. Wash*, the Supreme Court of California held that a prosecutor's use of otherwise admissible crime scene photographs and a taped confession during the prosecution's opening statement was permissible as a means of "prepar[ing] the minds of the jury to follow the evidence and to more readily discern its materiality."^{vi} Courts in Arizona and Hawaii have more recently upheld the use of multimedia PowerPoint presentations that contained later admitted photographic evidence with superimposed text headings.^{vii}

Accordingly, defense counsel should always articulate to the court all of the reasons the proposed demonstrative enhances jurors' comprehension of the evidence. Or, counsel should rely on the logical wisdom of Judge Castel: "[I]f you can say it, I would assume you could write it down on a piece of paper, and if you could write it down on a piece of paper, you could write it down or print it on a piece of pretty paper."^{viii}

CONCLUSION

Now more than ever, maximizing the chances of obtaining a favorable verdict for the client at trial requires the seamless combination of verbal communication and visual stimuli. Technological advancements such as the Internet, email, and smartphones have exacerbated the

natural human tendencies to quickly lose focus, and to prioritize first-received information over what follows. Blending compelling demonstratives into your opening statement can significantly strengthen a lawyer’s case presentation, and failing to do so can place a lawyer at a substantial disadvantage. Although it is difficult to imagine the case that would not benefit from effective demonstratives, the importance of using persuasive visual aids is particularly pronounced in cases that involve long trials, a foreign concept, or complicated information. The particular demonstratives called for in a given case will change based on the situation, but the potential benefits of using them apply virtually without exception.

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- ⁱ Asch, S. E. (1946). Forming impressions of personality, *Journal of Abnormal and Social Psychology*, 41, 258-290.
- ⁱⁱ Michael E. Cobo, “A Strategic Approach to Demonstrative Exhibits and Effective Jury Presentations,” 395 PLI/Lit 359 (1990).
- ⁱⁱⁱ Robert F. Seltzer, “Evidence and Exhibits at Trial,” 387 PLI/Lit 371, 379 (1990).
- ^{iv} Park, J., and Feigenson, N. (2013) Effects of a Visual Technology on Mock Juror Decision Making, *Applied Cognitive Psychology*, 27, 235-246.
- ^v *Schwartz v. Twin City Fire Insurance Company, et al.*, Docket No. 05-Civ.-7943 (PKC) (TT at pgs. 9 – 10).
- ^{vi} 861 P.2d 1107, 1133 (Cal. 1993).
- ^{vii} See *State v. Sucharew*, 66 P.3d 59 (Ariz. Ct. App. 2003); *State v. Smith*, 2006 Haw. LEXIS 163 (Haw. 2006).
- ^{viii} *Schwartz v. Twin City Fire Insurance Company, et al.*, Docket No. 05-Civ.-7943 (PKC) (TT at pgs. 9 – 10).