Using Technology and Other Strategies in Opening Statement and Closing Argument

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Using Technology and Other Strategies in Opening Statement and Closing Argument

We test communication by conveying a message and having the recipient understand it, be interested in it and remember it. Any other measure is unimportant.


I. Keeping Pace

Educators know it. Hollywood knows it. Anyone who’s tried to lead a meeting knows it. And it’s critical for today’s litigators to realize: audiences are more impatient, more expectant, and more easily distracted than ever.

Our collective attention-deficit has been attributed to several factors:

· Research has shown that technology has become a part of the fabric of our daily lives. (A recent study pointed out that the average U.S. household has 29 technology gadgets or appliances.)

· The Internet has given us access to all types of data, instantly—and anything less seems cumbersome by comparison.

· The time-crunch under which we operate makes us gravitate toward information delivered in sometimes deceptively simple “sound bites.”

· Finally, technology has made us accustomed to being entertained and stimulated, rather than lectured to. More than ever before, the perception is that the “medium is the message.”

This is particularly true with Generations X (born between 1966 and 1981) and Y (born after 1981), the former being raised on cable TV and video games, the latter on the Internet, text messaging, blogs and podcasts. These jurors expect quick access to headlines and diverse forms of presentation. According to a June 11, 2004, article in the *National Law Journal,* “more than 40 percent of the national jury pool is made up of young ‘Gen X’ and ‘Gen Y’ jurors.”

The price any litigator pays for not keeping pace with today’s jury’s expectations and high standards for entertainment can be deadly: disengagement. When confronted with a subject matter too tedious, complex, or remote, the typical reactions are to become frustrated, to turn off—and worse, to look elsewhere for a more digestible explanation. In a courtroom, this could lead to your opponent.

II. Cutting through the Haze

Making things clear, impressive, and thus more memorable is a key reason behind the dramatic growth of demonstrative visuals and increasing sophistication in courtroom technology. We know from numerous studies that jurors will understand more and retain it longer with both visual and verbal presentations.

It’s ironic that while legal cases grow increasingly complex and cumbersome, victory often goes to the side that makes its points most readily understandable and presents its strengths best—and the earlier in the trial the better.
III. The Medium Is *Not* the Message—Especially in Opening Statement and Closing Argument

All too often we see attorneys focus on available technology options to drive their communications strategy in opening statement. In fact, jurors should be unaware of the technology used if they are appropriately tuned in to your messages and themes. Your focus should be on communications *strategy*, and then decide what technology best supports it.

*Voir dire* can be your first opportunity to frame your story, but opening is your first chance to “sell” your story. However, unless you present information the way jurors assimilate it, you just won’t connect. This means putting the case into context. Studies have shown that most of us prefer to know the bottom line first, as opposed to the literary technique of building to a point. A juror’s brain wants to categorize incoming information, and unless he has themes or “buckets” to help him classify and structure the information, he may well think, “Let me know when you get to the point.”

Thus, your strategy in communicating to a jury should be:

- **State and display** the themes and conclusions first (what’s this case really about?)
- Put messages into context (remind jurors of the point you’re making with chapter heads throughout your presentation)
- Make comparisons (use visuals with stories and analogies that resonate with jurors’ own experiences)
- Summarize the critical documents and evidence in your case (summary boards, chronologies, parties charts)
- Keep it simple (one or two points per slide)
- Mix the presentation media (use a variety of visual tools to organize information and keep the jury engaged)

The same rules apply in closing argument when it is crucial to summarize the evidence for the jury and make the arguments they need to use to successfully deliberate in the jury room. Visually tying the facts and evidence to the jury instructions is also effective in helping the jurors support your conclusions. And refer back to the same chart you used in opening statement (What’s this case really about?) to remind the jury that the evidence presented supports the themes and conclusions you introduced in your opening.

The old adage is true: Tell them what you’re going to tell them, tell them, and tell them what you’ve told them. To these, we would add this: Also *show* them.

IV. Technology by Design

How do you know that you’re using the right technology at the right time to support your communications strategy? What are the options?

A. Boards

Anything electronic is generally understood to be “technology,” and this includes even the document camera or “Elmo.” However, there are many occasions where using low or no-technology is the best solution. Boards or blowups are one example. We recommend using boards for your most salient points—the ones you want to keep in front of the jury for as long as possible. And much like the “Pavlov’s dog response,” every time
that a board appears, a juror should think, “ok, this must be really important, because they are using a board.”

Use boards for:

- key themes
- time lines
- maps
- parties charts
- smoking guns

*Example:* The following boards were used in opening statement by the defense in an asbestos trial to communicate themes and conclusions:

<table>
<thead>
<tr>
<th>What This Case is About</th>
<th>The Rest of the Story</th>
</tr>
</thead>
<tbody>
<tr>
<td>- Mr. Dailey’s <em>entire</em> work history</td>
<td>- Mr. Dailey’s heavy exposure in the U.S. Navy</td>
</tr>
<tr>
<td>- OilCo is a good company that cares about its employees and their health and safety</td>
<td>- The other companies that he sued who aren’t here</td>
</tr>
<tr>
<td>- OilCo did not cause Mr. Dailey’s disease</td>
<td>- What he told his doctors</td>
</tr>
<tr>
<td>- Mr. Dailey never personally accused OilCo</td>
<td>- What OilCo did to pro-actively protect its workers</td>
</tr>
<tr>
<td></td>
<td>- No doctor has positively determined that he had an asbestos-related disease</td>
</tr>
</tbody>
</table>

### B. Document Camera

In general, we counsel against the use of the document camera. The clarity and thus readability of the image is lower than that of a computer output. Zooming into the document to increase the size of the text means moving the document around to make it “fit.” The time it takes to place a document on the camera, center it, adjust it, remove it and then place a new document slows the process, lengthens the trial, and is likely to annoy the jury. They will often begin to focus on “will they get the document right this time?” rather than concentrating on the content of the document.

### C. PowerPoint

PowerPoint is the most controversial technology in the courtroom today. It’s controversial because, while it has real advantages, it is often misused.

- Its advantages are that it is easy to learn, inexpensive, and useful for linear presentations.
- Its disadvantages are that it not a seamless tool for “jumping around” in a presentation, and it can’t be used to zoom into or highlight a document “on the fly.”

### D. Misuse of PowerPoint Is Rampant:

- Just because PowerPoint has many presentation capabilities (text dissolves, zooms, fades or other snazzy transitions) does not mean that you should use each and every one of them!
- All designers are not created equal, and effective display of information on each slide is an art that develops with practice: choosing the right colors, determining how to present the information step by step, or in layers, to give jurors time to absorb it.
If properly prepared, it can be appropriate to use PowerPoint in your opening statement. In this instance, your presentation is generally precrafted and linear. There is no need to zoom into documents on the fly because they can be highlighted and excerpted in advance. Since you are simply moving from one slide to the next, the presenter can even use a remote control to advance the presentation.

Use prepared document excerpts in PowerPoint to ensure readability:

From an MTBE case supporting the argument that ethanol has never been a viable alternative.

Builds can also be used in PowerPoint to present the information in layers, bit by bit, so as to maximize the jury's understanding and minimize confusion:

In this example, the data from each test well was brought in one well at a time. All results were at or below the EPA standard.

E. Trial Presentation Software

TrialDirector and Sanction are two of the most commonly used trial presentation software packages. Both of these software programs use nonproprietary formats and integrate well with other programs such as Summation and PowerPoint. There is a substantial learning curve for these programs, and thus it is inadvisable for the casual user to operate them in the courtroom. Professional trial presentation technicians are available for that purpose.

Trial presentation software is most effective when used with video depositions, allowing the viewer to simultaneously read the scrolling transcript while watching the video. Since jurors are both reading and hearing the testimony, they are more likely to retain it.
Screen shot from Sanction of a video deposition with scrolling text.

Trial presentation software is also the best technology to use with document-intensive cases since it allows for excerpting and highlighting documents “on the fly.” This interactivity makes an otherwise laborious and dull presentation more interesting and memorable to the jury. And it focuses the jury on key points you want to make. If you are using a large number of documents in your opening statement, Sanction or TrialDirector is the best technology choice.

Sanction document excerpt

F. Animations

The great value in using animations is that they can help you see what you can't normally see, go where you can't normally go, and graphically simplify a complicated process. This is particularly true with abstract and complex scientific concepts such as those found in toxic tort cases. The science needs to be explained in a way that is both compelling and understandable to the jury. It should teach them about the science in small doses, while at the same time reminding them of how it fits into your case theme.

G. Graphics

Whether as boards or e-slides, graphics should be an integral part of your opening statement and closing argument. Consider the following examples:
In discussing scientific studies, use visuals to show whenever possible where the plaintiff does not exhibit the typical profile, as shown above.

Differentiate plaintiff's lifestyle from population studied.

Put work history into context.
Explain scientific principles.

Diffuse the belief that any amount of exposure to a chemical or element can be toxic, no matter how small the dose.
Contrast and compare data or facts to support your conclusion.

<table>
<thead>
<tr>
<th>1950s Naval Shipyard</th>
<th>1980s OilCo Control Room</th>
</tr>
</thead>
<tbody>
<tr>
<td>Heavy asbestos exposure</td>
<td>No asbestos</td>
</tr>
<tr>
<td>Poor ventilation</td>
<td>Filter, conditioned air</td>
</tr>
<tr>
<td>Dusty environment</td>
<td>Dust-free environment</td>
</tr>
<tr>
<td>Poor knowledge of asbestos risk</td>
<td>Heightened awareness of asbestos risk</td>
</tr>
<tr>
<td>High reported incidence of asbestos disease</td>
<td>No reported incidence of asbestos disease</td>
</tr>
</tbody>
</table>

Summarize the main points of the expert’s testimony—or why the other party’s testimony is erroneous or inconsistent.
Use interactive timelines to tell the story in manageable sound bites.

The bottom line: use graphics as liberally as possible to show context, comparisons, contrasts, summaries, and to otherwise visually support elements of your story in opening statement and closing argument.

**H. Symposium Interactive Pen Display**

A relatively new technology is the Symposium interactive pen display. Like the “John Madden” football playback, the Symposium pen allows you to write with digital ink over projected images in PowerPoint, video, and other mediums. The display panel for the pen also enables you to remotely control the computer.

**V. Courtroom and Arbitration Room Setup**

Ensuring that the courtroom setup allows for optimal viewing for the jury, judge, and witnesses is as important as using the right technology. Sit in every seat in the jury box while a sample document is projected to be sure that each juror will be able to read the selected text.

Don’t include multiple monitors throughout the courtroom unless there is no other option. In addition to taking up valuable space (and costing more), it means that jurors, witnesses, judge and counsel will all be looking in different directions. The optimal solution is to place one large screen across from the jurors and
make sure that you are standing between the screen and the jury box. This allows you to watch the jurors’ reactions as you point to elements on the screen with your laser pen.

*Do* include a back-up computer with a mirror image of your case. Technology is “grand” until it doesn’t work. If you are using a computer projector in a remote location, an extra bulb is a must.

*Do* test all the equipment the morning of your opening statement and closing argument. (and every day of the trial that you will be using the equipment)

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**VI. The Wireless Courtroom**

Today, Internet capabilities have revolutionized the use of visual presentations in courtrooms. In a recent case held in one of the new wireless courtrooms in the Harris County Civil Courthouse, defense counsel benefitted from the wireless connectivity. During the plaintiffs’ opening statement defense counsel used his Blackberry to e-mail his trial technician to include a new summary slide in his opening presentation. The trial technician e-mailed the off site graphic artist who completed the slide, e-mailed it back to the trial technician who had it ready to go for the defense attorney’s opening statement. Thus, there is constant, real-time communication between the lawyers, the trial technician, and the off site support team.

**VII. Conclusion**

The use of technology of all kinds has been increasing as lawyers realize its value and dramatic impact on communications to the jury. Technology can help bring organization and clarity to your opening statement and closing argument. It allows you to present your case in a format that is most appealing to today’s juror: one that is visually oriented, focuses on “getting to the point” messages, and helps deliver information in sound bites. An added benefit is that visual aids keep jurors interested, and that significantly enhances their understanding and retention. This can be particularly important in juror deliberations when jurors can instruct others to recall a particular visual aid.

All trial attorneys realize that a picture is worth a thousand words—but today's technology is speaking volumes.