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The electronic presentation of evidence in opening statement

PERSUADING YOUR JUDGE THAT WHAT YOU ARE ASKING FOR IS NOT OBJECTIONABLE OR PREJUDICIAL

As plaintiff's trial lawyers, we have the unique opportunity of going first. We give our mini-opening statement first, we voir dire the jury first, and we give our opening statement first. Going first provides the opportunity to tell the jury what really happened. It provides for the opportunity to buffer your bad facts before the defense has the chance to put their spin on them. It also provides the opportunity to show the jury what *you* believe the evidence will show throughout the trial before the defense even has the chance to speak.

One of the most effective tools at our disposal to convey what the evidence will show in a concise and understandable way is the electronic opening statement (i.e., PowerPoint or Keynote). Not only does this provide you – the trial attorney – with a roadmap during your opening statement so that your story flows and makes sense, but it also provides the jury with a *visual* roadmap of what you believe the evidence will show during trial. Within your slides you can select which exhibits, documents, or video-deposition clips you believe best suit your goal of persuading the jury to find in favor of your client as early as opening statement, and you can use the tools and applications within PowerPoint or Keynote to present and highlight evidence in a way that is clear, understandable, and above all else, persuasive. (See exhibit below.)

Unfortunately, it is not always that easy. You will likely be met with objections by the defense. I have yet to have a trial where the defense has been agreeable to using electronic opening statements, and they *never* agree to publishing exhibits and video-deposition clips during opening statement. Their reasoning does make sense though: They want to dictate how you try your case to the jury. The defense wants your story to be less clear and understandable. In their minds, without your polished presentation, the advantage of going first is in some way diminished. What follows is some insight into how I persuade judges to allow not only electronic opening statements, but the presentation of exhibits and video-deposition clips before they are admitted into evidence. With these tips, you should be able to persuade your judge to let you try your case.

First things first – CCP 2025.220

Always check first with opposing counsel to see whether they will agree to using PowerPoint or Keynote, exhibits, and/or

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video-deposition clips in opening statements. You will save yourself a lot of time and headache by simply asking whether they are agreeable to your proposal. You will likely get shut down, but you cannot get what you do not ask for.

Specific to video-deposition clips there are prerequisites you must follow, or you will not be allowed to play *any* video-deposition clips at all during your case in chief, let alone during opening statement. California Code of Civil Procedure section 2025.220, subdivision (d) requires that a party intending to record deposition testimony by audio or video technology give notice of said intention in the party's deposition notice. (Code Civ. Proc., § 2025.220, subd. (d).) If a party intends to offer audio or video recording of a deposition into evidence at trial, the party *shall* notify the court and all parties in writing of that intent and of the parts of the deposition to be offered. (Code Civ. Proc., § 2025.340(m).) That notice *shall* be given within sufficient time for objections to be made and ruled on by the judge to whom the case is assigned for trial or hearing, and for any editing of the recording. (*Ibid*.) The court may permit further designations of testimony and objections as justice may require. (*Ibid*.) Further, an adverse party may use for *any purpose*, a deposition of a party to the action, or of anyone who at the time of taking the deposition was an officer, director, managing agent, employee, agent, or designee under section 2025.230 of a party *even if the deponent is available to testify, has testified, or will testify at the trial or other hearing*. (Code Civ. Proc., § 2025.220(b).) Finally, a party can use video recording of the deposition testimony of a treating or consulting physician or of *any* expert witness, even though the deponent is available to testify. (Code Civ. Proc., § 2025.620, subd. (d).)

Which clips to show the jury

Keep a log of potential video-deposition clips that you intend to play at trial as the case progresses. When you get the deposition transcript of a witness back and you read it for the first time, highlight portions that you feel you might play at trial. Once all the witnesses have been deposed and you have your list of proposed video-deposition clips, go back, and read the transcript highlights. You will often find that what you thought was important early in the case is no longer important and vice versa. Pair down your list of potential video-deposition clips to one or two clips per witness. Keep them short – you do not want to be standing in front of the jury for three minutes while they watch a deposition clip during your opening statement.

After you have that list paired down to one or two per witness, go back, and watch that portion of the video deposition. Often you will find that there may be awkward pauses, distracting noises such as paper shuffling, or that you were in a heated part of cross-examination, and you sound like a jerk. What reads well on paper does not always translate to video. Fight the urge to be overinclusive in your video-deposition clips. The less you have, the less the judge must rule on. The less the judge must rule on, the more likely it is that you will get to play the clips in opening and during your case in chief.

Standing orders and California Rules of Court

Some judges have their own general standing orders permitting the presentation of exhibits and video-deposition testimony during your electronic opening statement if the evidence is reasonably likely to be received in evidence. Typically, these judges will still require you to share your opening statement with the court and opposing counsel in "sufficient time" before they are to be used to allow for study and objection outside of the jurors' presence. (See Cal. Judges Benchbook Civ. Proc. Trial § 7.22.) No strict timeline applies, but a best practice is to submit a PDF printout of your slides to the court and opposing counsel at the time of the final status conference to give yourself time to make edits, if necessary.

Other judges do not have their own general standing orders, and instead, follow Rule 3.97 of the California Rules of Court, which states in pertinent part: "In opening statements to the jury by counsel, no display to the jury or reference should be made to any chart, graph, map, picture, model, video, or any other graphic device or presentation except (1) when marked as an exhibit and received in evidence, (2) by stipulation of counsel, or (3) with leave of court." As Rule 3.97 makes clear, absent the court pre-admitting evidence or by stipulation of counsel, you must seek leave of court to not only use PowerPoint or Keynote during your opening statement but also to show exhibits and video-deposition clips you expect to enter into evidence during trial. This can be accomplished by filing a stock motion in limine that you can modify for each trial depending on the facts of your case, even though it is technically not a proper motion in limine.

Make sure that you file a corresponding declaration and attach a PDF printout of the slides of your opening statement with the exhibits you intend on showing to the jury. If you intend to play video-deposition clips during your opening statement, be sure to bring with you to the final status conference a USB thumb drive with your video-deposition clips to show the judge.

If you can in murder trials, you can in civil trials

The most common defense objection is that an electronic opening statement is unduly prejudicial. This is code for: "We weren't willing to put in the extra work, your Honor, so please don't let the plaintiff's lawyer show the jury that they're prepared." The defense attorney will typically bookend this argument by claiming that it is improper

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to show exhibits or video-deposition clips during opening statement because they are "shown to the jury out of context," which, according to the defense, is also misleading and confusing to the jury. Never mind the fact that you can just as easily twist "what the evidence will show" with your words during your opening statement, but it is better to get ahead of the issue by filing your stock motion in limine rather than get in a tit-for-tat with the defense lawyer a day or two before you start picking your jury. In your motion, cite California criminal law. You can make far more persuasive arguments citing criminal law because it highlights the absurdity of the defense's claim of prejudice.

For example, one issue before the California Supreme Court in *People v. Wash* (1993) 6 Cal.4th 215, 256, was whether the prosecutor committed prosecutorial misconduct when, during his opening statement, he played a portion of the defendant's taped confession while simultaneously displaying slides of the crime scene depicting gruesome photos of the two murder victims. On appeal, the defendant argued that their use in this manner exceeded the proper scope of an opening statement and inflamed the jury in violation of his constitutional rights to a fair trial.

The Supreme Court rejected this argument and stated in no uncertain terms that "[t]he purpose of the opening statement 'is to prepare the minds of the jury to follow the evidence and to more readily discern its materiality, force and effect' [citation], and *the use of matters which are admissible in evidence, and which are subsequently in fact received in evidence, as visual or auditory aids is appropriate*." (*Id*. [citing *People v. Green* (1956) 47 Cal.2d 209, 215]; accord, *People v. Ramos* (1982) 30 Cal.3d 553, 575; (emphasis added).) Thus, according to the Court, because both the taped confession and the photographs and slides were ultimately admitted into evidence, there was no error. (*Wash*, *supra*, 6 Cal.4th at 257 (quoting *People v. Fauber* (1992) 2 Cal.4th 792, 827 ["it is *well settled* that the 'use of photographs and tape recordings, intended to be admitted in evidence, as visual or auditory aids is appropriate."]) (emphasis added).)

In *People v. Fauber*, one issue before the California Supreme Court was whether the prosecutor committed prosecutorial misconduct by publishing an enlarged poster, which highlighted key, corroborating testimony from the preliminary hearing that the prosecutor would later elicit during the murder trial:

> And [the defendant] said, 'I think I killed him.' 'Are you sure? You got to be kidding.' 'Yeah, I'm pretty sure."

The defense attorney objected to the form of the poster, specifically to the highlighted portions, arguing that it took parts of the witness's testimony *out of context* and was prejudicial to the defendant. The trial court overruled the objection and ruled that the poster could be used as an illustrative aid in the prosecutor's opening statement. On appeal, the defendant contended that the ruling constituted error because the poster "preconditioned" the jury to believe the witness's testimony, which, according to the defendant, violated his Fifth, Sixth, Eighth, and Fourteenth Amendment rights. (*Id*. at 827.)

Just like in *Wash*, the Supreme Court rejected this argument, stating that "the illustrative use of an enlarged page of transcript" is not improper because the witness ultimately testified consistently with the transcript. The Court further noted that "the mere appearance of the poster" could not have been construed by the jury to be so "official" that it caused jurors to prejudge the witness' credibility as claimed by the defendant.

The key takeaway from *Wash* and *Fauber* is that, provided the exhibits and video-deposition clips are likely to be admitted into evidence during the trial, there is no prejudice to the defendant in publishing the same during your opening statement. In other words, if it is *not* a violation of an alleged murderer's constitutional rights to a fair trial to publish during opening statement his taped confession, gruesome photos of his victims, or an enlarged poster of sworn testimony, then it surely is *not* prejudicial to a civil defendant to publish medical records, scene photographs, or video-deposition clips that will be admitted into evidence during the trial.

Try *your* case

At the end of the day, what you are really asking the judge is to let you try your case within the bounds of ethics, professional responsibility, and the law. Judges retain broad authority and discretion to enforce order in the proceedings before them. (Code Civ. Proc., § 128.) Appeal to their sense of order in the court and reinforce in their minds that what you are asking for is not objectionable or prejudicial; rather something to aid in the efficient resolution of the trial. Persuasively argue to the judge that allowing the electronic presentation of evidence during opening statement serves one goal and one goal only: to prepare the minds of the jury to follow the evidence and to discern its materiality, force, and effect more readily.

Brian is the founder and Chief Trial Counsel at Poulter & Co. based out of Los Angeles. His practice has been dedicated to representing victims of elder abuse, catastrophic personal injury, wrongful death, and products liability. Brian is a graduate of Loyola Law School where he was part of Loyola's nationally-ranked Byrne Trial Advocacy Team. *His trial experience includes a mid-seven-figure elder-neglect verdict. brian@poulter.co*