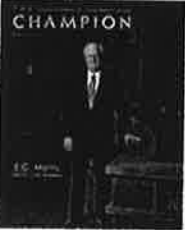


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[Home](#) > [News And The Champion](#) > [Champion Magazine](#)**The Champion****August 2015 , Page 54**[Search the Champion](#) Looking for something specific?**Incorporating Memorable Demonstratives Into Opening Statements****By Joshua Dubin, Esq.**

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Attention spans are getting shorter. Although scientists debate the reasons, as well as the short and long-term impact on 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 people 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 and can communicate clearly, and that the prosecutors may not have what it takes to obtain 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. This 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 ingrained 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,<sup>1</sup> social psychologists began to explore the reasons 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.

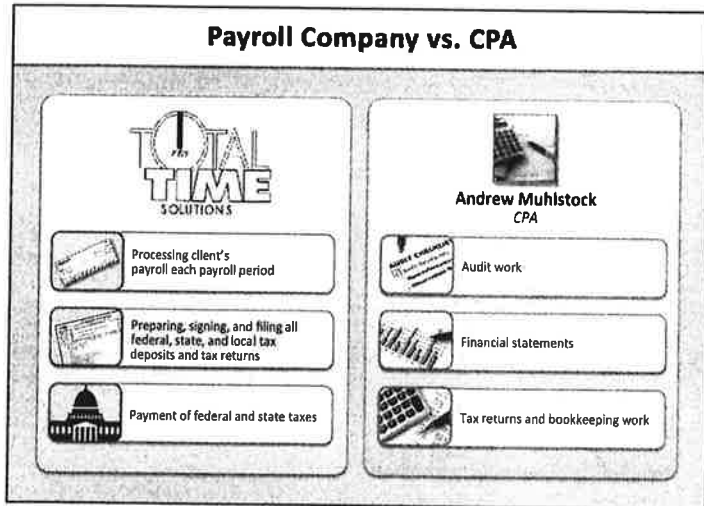
In a study conducted by Michael E. Cobo, scientists found that on average, humans retain only 15 percent of information received from audible sources. Interestingly, they found that retention climbs to 65 percent when the information is delivered visually.<sup>2</sup> Similarly, a second study by Robert F. Seltzer found that the average person retains 87 percent of information presented visually, but only 10 percent of information presented orally.<sup>3</sup>

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 the level of juror persuasion, but also with recollection of evidence and perceptions of the advocates.<sup>4</sup> 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 involves 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 how to incorporate 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.



public accountant and the work of a payroll company.

Demonstrative exhibits should not be complicated. This simple chart juxtaposes the work of a certified

### Examples of Effective Opening Demonstratives

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

*United States v. Irving Lorenzo and Christopher Lorenzo.* Gerald Lefcourt and Jerry Shargel tried the Lorenzo case in the Southern District of New York in 2005. The government alleged that defendants, owners of hip hop label Murder Inc. Records, laundered money for a reputed drug dealer. One of the biggest challenges was that multiple government informants would testify that they witnessed the defendants counting large amounts of cash in a conference room at the offices of their record label. On some occasions, the defendants counted the cash in the hours or days after the alleged drug dealer visited the defendants' offices.

Perhaps the most important message that Mr. Lefcourt wanted to send to jurors during his opening statement was that there was a completely logical, lawful explanation for large amounts of cash being present at the offices of Murder Inc. Records. Specifically, one of the record label's top artists, Ja Rule, was on a concert tour during the time period at issue in the indictment. It was standard in the music business for performers like Ja Rule to require concert promoters to pay a portion of their booking fee in cash on the night of the performance. This practice protected the performer from fly-by-night promoters who would sometimes bounce checks if ticket sales did not pan out to their satisfaction.

To explain how the process worked, Mr. Lefcourt created a demonstrative aid that he displayed in PowerPoint during his opening statement. First, he established the relationship between a concert promoter and Ja Rule, and then showed a contract that would ultimately be admitted during trial. Notably, the contract contained a provision that required the promoter to pay Ja Rule \$7,500 in cash, one hour prior to the concert. In the next series of slides, Mr. Lefcourt created a flow chart that illustrated how Ja Rule's road manager would take the cash on the night of the concert (along with proceeds generated from the sale of merchandise such as concert t-shirts) back to the offices of Murder Inc. Records. It was in the conference room that the money would be counted, and subsequently given to a bookkeeper the next day, after which it would be deposited into the record label's account at Citibank.

The jury acquitted the defendants of all charges. Of course, Mr. Lefcourt could have simply explained the reason for the cash to jurors through rhetoric. But doing so arguably would not have carried the same persuasive impact. When interviewed after the trial, roughly half of the jurors (5 out of 12) cited Mr. Lefcourt's demonstrative as one of the primary reasons they began to doubt the government's case from the outset. Four out of these five jurors felt that the government lost a degree of credibility because they never addressed the chart during their closing argument. This is a good example of taking a simple concept and making it stand out in the minds of jurors from the very beginning. Mr. Lefcourt was able to provide an alternative — and completely logical — explanation for the presence of stacks of money on his client's conference room table. What could be more important in a money laundering case?

*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 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.

### 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 demonstrative 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 during opening statement what counsel expects the documentary evidence to be during trial carries with it some inherent risk. Consider the following sentiments from Judge Castel in the Southern District of New York during a complex insurance case when instructing the parties about their use of demonstrative aids during opening statements:

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.<sup>5</sup>

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 of demonstratives during opening statements 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 demonstratives during openings if such demonstratives would "aid jury comprehension."<sup>6</sup> 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."<sup>7</sup> 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.<sup>8</sup>

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."<sup>9</sup>

### 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 the opening statement can significantly strengthen a lawyer's case presentation, and failing to do so can place the 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.

### Notes

1. S.E. Asch, *Forming Impressions of Personality*, 41 J. Abnormal Social Psychol. 258-290 (1946).
2. Michael E. Cobo, *A Strategic Approach to Demonstrative Exhibits and Effective Jury Presentations*, 395 PLI/Lit 359 (1990).
3. Robert F. Seltzer, *Evidence and Exhibits at Trial*, 387 PLI/Lit 371, 379 (1990).
4. Jaihyun Park & Neal Feigenson, *Effects of a Visual Technology on Mock Juror Decision-Making*, 27 Applied Cognitive Psychol. 235-246 (2013).
5. Transcript of Record at 9-10, *Schwartz v. Twin City Fire Insurance Company, et al.*, Docket No. 05-Civ.-7943 (PKC).
6. Federal Judicial Center, *Manual for Complex Litigation*, Fourth § 12.21 (2004).
7. *People v. Wash*, 861 P.2d 1107, 1133 (Cal. 1993).
8. See *State v. Sucharew*, 66 P.3d 59 (Ariz. Ct. App. 2003); *State v. Smith*, 2006 Haw. LEXIS 163 (Haw. 2006).
9. *Schwartz*, *supra* note 5.

### About the Author

Joshua Dubin is the founder of Dubin Research & Consulting, which provides services for trial lawyers including jury selection, messaging, focus groups, demonstrative aids, and transcript analysis. He is a co-author of *The Law of Juries* (8th edition).

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