



Opening Statement: Appeal to your jury without getting appealed

Avoid the pitfalls of falling into objections that can get witnesses or evidence stricken.



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WILLIAM VEEN AND KAREN STROMEIER

Vinny Gambini: “Uh... everything that guy just said is bullshit. Thank you.”

District Attorney Jim Trotter: “Objection. Counsel’s entire opening statement is argumentative.”

Judge Chamberlain Haller: “Sustained. Counselor’s entire opening statement, with the exception of ‘thank you,’ will be stricken from the record.”

— *My Cousin Vinny* (Twentieth Century Fox 1992)



Veen

Opening statement is an opportunity to establish the themes of your case, and to present a persuasive and compelling story introducing your witnesses and evidence. By avoiding a few pitfalls you can keep it from getting mucked up by objections – and perhaps more importantly prevent it from being stricken in its entirety or being grounds for mistrial or reversal.

The two major areas that are off-limits in opening statement are overt argument (*Love v. Wolfe* (1964) 226 Cal.App.2d 378), and discussing the applicable law. (*Williams v. Goodman* (1963) 214 Cal.App.2d 856.) This is a hard line to straddle, as “aggressive advocacy is not only proper, but desirable.” (*Love v. Wolfe*, supra, 226 Cal.App.2d at p. 393.) While in many instances using the phrase “the evidence will show” will keep you in safe territory, the same appellate court that heralded zealous advocacy counted among plaintiff’s counsel’s prejudicial misconduct in opening with the statement “There isn’t a bigger con outfit in the world than [defendant], and I will prove it before I get through with this case.” (*Id.* at p. 385.)

Other areas that have been deemed improper in opening statement and potential grounds for reversal include:

- Suggesting a defendant has a right to indemnity which would reduce her loss if she were held liable. (*Neumann v. Bishop* (1976) 59 Cal.App.3d 451.)
 - Appealing to the sympathy of the jury based on the size or corporate status of a defendant. (*Brokopp v. Ford Motor Co.* (1977) 71 Cal.App.3d 841.)
 - Mentioning of the wealth or poverty of any party. (*Love v. Wolfe* (1964) 226 Cal.App.2d 378.)
 - Discussing prior settlements or settlement offers. (Evid. Code, § 1152; *Shepherd v. Walley* (1972) 28 Cal.App.3d 1079.)
 - Referring to the existence of liability insurance. (Evid. Code, § 1155; *Swift v. Winkler* (1957) 148 Cal.App.2d 927.)
 - Stating counsel’s personal beliefs or opinions. (*Hawk v. Superior Court* (1974) 42 Cal.App.3d 108 [counsel continuously referred to defendant as his friend and vouched for his credibility].)
 - The “Golden Rule” argument: Statements from which the jury might infer that it was proper in calculating damages to place themselves in the plaintiff’s shoes and award the amount they would “charge” to undergo equivalent disability, pain, and suffering. (*Brokopp v. Ford Motor Co.* (1977) 71 Cal.App.3d 841.)
- And be on the lookout for areas defense counsel are prohibited from mentioning:
- Commenting on a plaintiff’s immigration status implying that they are less worthy of compensation. (*Hernandez v. Paicius* (2003) 109 Cal.App.4th 452.)



• A city attorney suggesting that an adverse verdict might lead to loss of city services. (*Du Jardin v. City of Oxnard* (1995) 38 Cal.App.4th 174.)

• Appealing to the self-interest of jurors as taxpayers. (*People ex rel. Dept. of Public works v. Graziadio* (1964) 231 Cal.App.2d 525.) Referring to plaintiff's right to worker's compensation benefits. (*Baroni v. Rosenberg* (1930) 209 Cal. 4.)

• Implying defendant is uninsured or underinsured and would have to pay the judgment personally. (*Hoffman v. Brandt* (1966) 65 Cal.2d 549.)

Don't forget that in order to have standing to demand a new trial, or preserve the error for appeal, the complaining party must show that they sought to preserve her rights by objecting to the prejudicial statements at the time they were made.

Engage everyone

Now that you know what not to do, here is what you absolutely must do: appeal to all learning types. Educational experts agree that there are three primary learning types: visual (those who retain information best by seeing the material), auditory (learn best by hearing the material), and kinesthetic (learn best by touch and experience). Everyone is a blend of the three styles, but one style is typically dominant.

Repeated studies have shown that 65 percent of the general population are visual learners, and 20 percent are auditory learners, that is why most people would rather watch TV than listen to the radio. Survey data strongly states that merely speaking information to a jury will result in under-communicating with 82 percent of the audience.¹ Ideally, a more balanced approach emphasizes visual information. One study has found that juror memory retention is increased 650 percent when oral communications are combined with visual communications.

All it takes is good faith and reasonable belief

Demonstrative evidence can be an incredibly powerful storytelling aid in opening statement and engaging visual learners.² The purpose of opening statement is "to prepare the minds of the jury to follow the evidence and to more readily discern its materiality, force and effect." (*People v. Arnold* (1926) 199 Cal 471.) To this end you are entitled to discuss anything that you have a good faith and reasonable belief will be supported by admissible evidence during the trial. (*Hawk v. Superior Court* (1974) 42 Cal.App.3d 108.) This includes any and all *anticipated* testimony during the trial of your client, witnesses, and experts; reading deposition testimony³, documents, and exhibits. A good opening has a memorable beginning and ending. This can be accomplished in many different ways; a slow, detailed, first-person narrative of a catastrophic event; a discussion of the rules that we expect to be followed (we expect the sidewalks to be a pedestrian promenade so we do not have to be valiantly scanning for sharp sticks at eye level); the purpose for those rules (safety of the public); detailed discussion of relevant anatomy (aren't the eyes amazing) all foreshadowing the ultimate events; a picture of the deceased displayed during a discussion of the losses her children have suffered in her absence.

To aid your story you may want to use maps and photos to orient the jurors to time and place; to highlight specific deposition testimony; models to illustrate anatomy and explain injuries; exemplar products or devices.

While you are entitled to talk about all the anticipated testimony and evidence you expect in the trial, what you show is completely in the discretion of the court. Ideally, you will establish a relationship with opposing counsel such that a stipulation could be reached about

using demonstrative evidence. More likely it will be the subject of a motion in limine. An example of a motion our office frequently uses is:

MEMORANDUM OF POINTS AND AUTHORITIES

Relevant Facts

This personal-injury action arises out of a November 2005 motor-vehicle accident.

Plaintiff's counsel requests permission to use the following during opening statement:

- (1) Diagram depicting accident location;
- (2) Exemplar photographs of the vehicles;
- (3) Deposition testimony (transcript and video)
- (4) Photograph of Plaintiff's family;
- (5) Graphics depicting the body and its anatomical structures;
- (6) Photographs or graphics depicting Plaintiff's injuries;
- (7) Chart outlining Plaintiff's course of treatment;
- (8) Chart comparing experts' recommendations for future care;
- (9) Correspondence concerning Plaintiff's employment;
- (10) Graphics concerning Plaintiff's wage loss and earnings-capacity loss;
- (11) Graphics concerning Plaintiff's physical limitations; and
- (12) A chart setting forth Plaintiff's special damages.

This material will be provided to defense counsel and the Court for review and approval before plaintiff's opening statement.

Legal analysis

The 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]. ..."⁴ The use of photographs and tape recordings, intended later to be admitted in evi-



dence, as visual or auditory aids is appropriate.⁵ Similarly, the illustrative use of an enlarged page of transcript was held not improper, even where the transcript had been highlighted to emphasize portions of the testimony.⁶

Use of visual aids in opening statement is not a matter of right. Such use is discretionary with this Court.⁷ The trial court may allow use of a chart, diagram, or other visual aid that is not itself admissible in evidence. "Even where a map or sketch is not independently admissible in evidence it may, within the discretion of the trial court, if it fairly serves a proper purpose, be used as an aid to the opening statement."⁸

Here, Plaintiff respectfully requests that this Court exercise its discretion to allow her counsel to make use of demonstrative aids during the opening statement. These aids will better prepare the jury for the tasks of analyzing and understanding the evidence that will be adduced at trial.

Defendants will not be prejudiced if this motion is granted. Plaintiff's counsel believes that most of the demonstrative evidence they may use will be admissible during the trial. The material will be provided to opposing counsel and the Court to review before it is shown to the jury. Finally, Plaintiff requests that the Court advise the jury before the opening statements that "[a]n opening statement is not evidence. It is simply an outline to help you understand what that party ex-

pects the evidence will show. Also, because it is often difficult to give you the evidence in the order we would prefer, the opening statement allows you to keep an overview of the case in mind during the presentation of the evidence. You cannot use it to make any decisions in this case."⁹

Conclusion

Paula Plaintiff respectfully requests that the Court grant this motion in limine and order that plaintiff's counsel be permitted to use demonstrative aids during plaintiff's opening statement.

If the court does not allow or severely limits demonstrative evidence in your opening, it is more challenging to engage visual learners. You are still able to use butcher paper and can create diagrams and write salient points like the amount of past and future special damages. Introducing your clients, especially if they are not going to be in the courtroom during the whole trial or having a parent introduce a catastrophically injured child can also be effective demonstrative evidence. Always remember though to attach whatever type of demonstrative evidence you do end up using to the story, because it will have no meaning unless the viewers care what happens next in the story.

Conclusion

Opening statements are all about story, themes and facts. By adhering to a few basic guidelines you can use various tools with confidence to help your jurors re-

tain the information in your opening statement.

Karen Stromeyer is an associate with the Veen Firm. Karen focuses on prosecuting large exposure cases and complex civil jury trials. She is a graduate of UC Berkeley and earned her J.D. from the University of California, Hastings College of the Law.

William Veen founded The Veen Firm as a sole practitioner in 1975, gradually developing it into a firm of more than 40 attorneys and staff who represent severely injured workers and consumers. He is a member of the American Board of Trial Advocates and he was honored as the Trial Lawyer of the Year by the San Francisco Trial Lawyers Association in 2003.

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Endnotes:

¹ Kenneth J. Lopez, *The Animators at Law Attorney Communication Style Study* (2007).

² The San Francisco chapter of ABOTA, organized by Rick Schoenberger, recently put on an exceptional Masters in Trial program on the use of demonstrative evidence in trial. A videotape can be obtained by calling (415) 239-8793.

³ As effective as videotaped deposition testimony can be, there is no hard rule on using it in opening statement and judges differ wildly as to whether they allow it.

⁴ *People v. Green* (1956) 47 Cal.2d 209, 215, overruled on another ground, *People v. Morse* (1964) 60 Cal.2d 631, 648-649.

⁵ *Ibid.*; see also *People v. Kirk* (1974) 43 Cal.App.3d 921, 929.

⁶ See *People v. Fauber* (1992) 2 Cal.4th 792, 827.

⁷ See *People v. Green*, *supra*, 47 Cal.2d at p. 215 (not error to allow counsel to refer to diagrams and maps not yet admitted into evidence (but later were)); *Heppler v. J.M. Peters Co., Inc.* (1999) 73 Cal.App.4th 1265, 1286.

⁸ *People v. Green*, *supra*, at p. 215, emphasis added (dictum because visual aid used in opening subsequently received in evidence).

⁹ CACI 101; see plaintiff's requested jury instructions.

