



A tale of two timelines

Leveraging technology in the big case – in preparation, mediation and the courtroom

BY MORGAN C. SMITH

There is often a quantum leap between how attorneys handle a run-of-the-mill case and a big case. While major cases are arguably the greatest part of practicing as a plaintiff attorney, they're also the most potentially worrisome. Big cases take attorneys far out of their comfort zones.

This article will address some of the ways in which you can leverage technology on major cases to prepare and present the best case you can throughout your litigation.

Before the first deposition

A major-sized litigation case generally demands an exponentially larger amount of documents and time than a typical case does. For the sake of efficiency – and for stress management – the first and perhaps most important thing you can do is develop a reliable electronic document management system. Follow these steps:

- Request all documents from a copy service as scanned PDFs in addition to getting hard copies.
- Scan all key documents of the case that you receive into PDFs.
- Develop a naming system for every scanned document of the case.
- Use sequential numbering in all depositions so you have a clean numbering system for all exhibits in the litigation.

If you follow those steps, then when the case is ready for trial, you already have a large part of your exhibit list completed, and whenever an exhibit is referenced in deposition, the testimony corresponds to the exhibit number at trial. Without this system in place, the

attorney must constantly “interpret” for the jury that, for example, “Exhibit 3” in the deposition of Smith is “Exhibit 23” in trial (and even more confusing, “Exhibit BB” for defendant).

Before your first dispositive motion

Big cases often come with big motions. A defendant will try anything to kick out a case at any stage on legal ground rather than face a major damage case. The first thing to realize is that *each of these motions is no less important than the trial itself*. This point may seem obvious but cannot be overstated. These motions have to be treated as trial, and technology can help you in a number of ways.

If you have been keeping a well-organized electronic document system, then you have all of the key documents electronically available for display at a hearing. Now it's time to think how to try your case before the judge for this motion. Always remember that judges are just as human as the rest of us; they are often overwhelmed with paper and have little time to review these critical motions. How can you help them with the task?

The answer is the same as with a jury: Make it visual and interesting. You may never have considered using a visual display for a motion, but you should absolutely consider the possibility. Most federal courts in California already have a visual monitor display system in place, and many of the state courts do as well. If your judge's courtroom has such a display in place, strongly consider a visual aspect to your motion argument.

However, do not develop a linear, text-heavy PowerPoint in which you talk

your way through every bullet point in every slide until the end. No judges would allow it, and they would be bored within minutes.

Instead, consider the following: Make a hyperlinked PowerPoint (or Keynote for Mac) with a cover slide that has buttons on a menu bar, with each button linked to a section in your argument sections that might be raised in the motion. Let's say it's a Motion for Summary Adjudication with many causes of action. The judge may have no interest in three of the causes of action, but seems very troubled by one. With a hyperlinked presentation, you can jump to that immediate section of concern and address that issue, and then jump to any other section that may be needed.

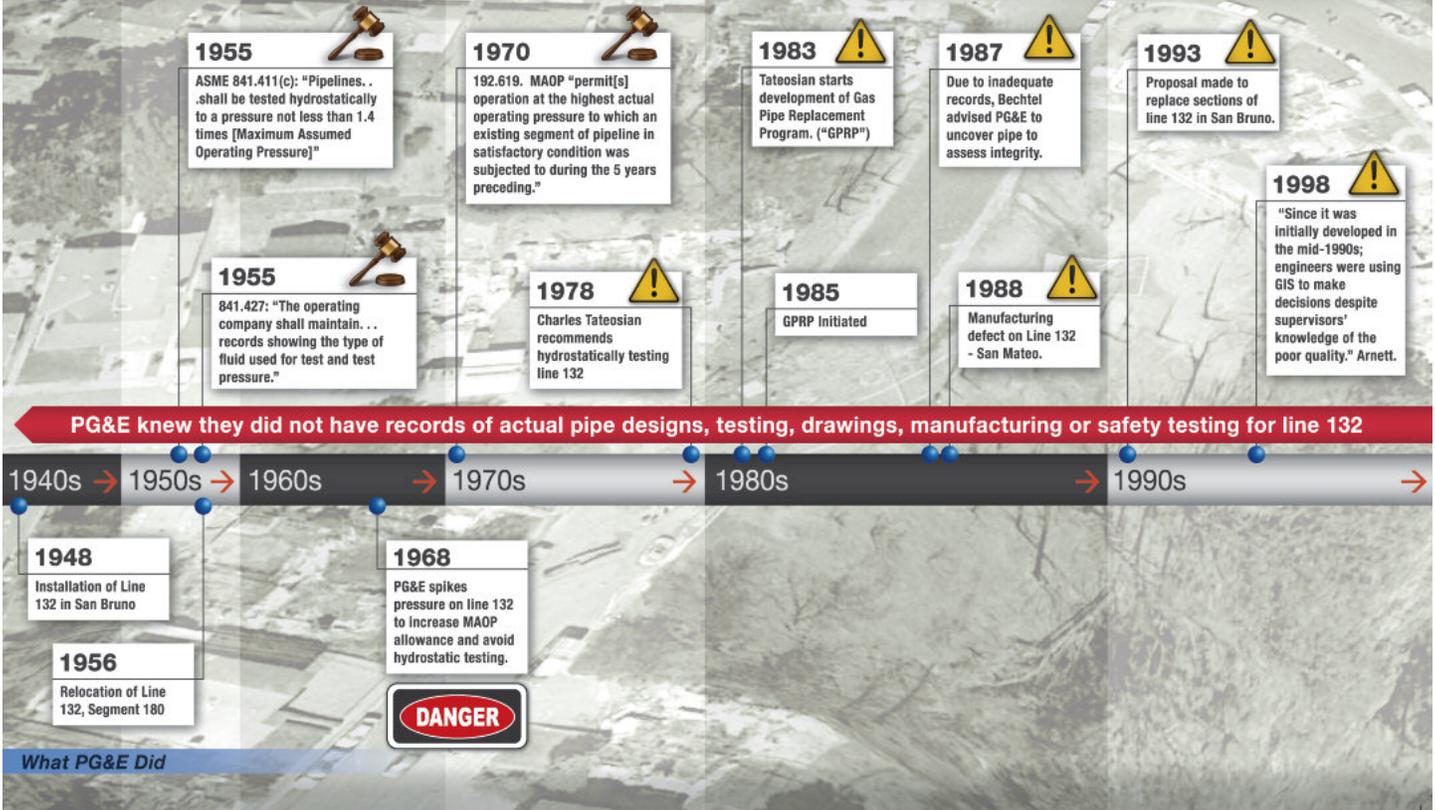
Additionally, consider ways to visually interpret the arguments with a couple of key images. This can be done with charts, maps or other graphics, and each image should serve to support your argument, not repeat your argument. For example, say an issue of duty is raised. You could show a graphic that uses icons and document call-outs to visually summarize the key facts from which a duty exists.

Often the best graphic for a motion is a timeline. Timelines can be created in PowerPoint or Keynote and be made interactive – meaning the presenter controls which pieces of information are displayed at any given point on the timeline, giving the presenter the ability to “build” information sequentially rather than showing it all at once. These timelines can be made in Adobe Flash with elements such as photos, video and document call-outs that pop out when you click on an element on the timeline.



PG&E's 54 Years of Conscious Disregard for Safety

What PG&E Knew



A prime example of an elaborate, interactive timeline exhibit comes from the PG&E San Bruno fire cases. Frank Petri of Cotchett, Pitre & McCarthy enlisted the services of my firm, Cogent Legal, to create a timeline for the motion for summary judgment on punitive damages. This case arose out of the 2010 gas line explosion that killed eight people and injured many more. The pipeline had missing welds, which caused the explosion when PG&E increased the pressure on the lines. PG&E admitted negligence but strenuously denied liability for punitive damages, claiming there was no evidence that PG&E was "aware" of any missing welds at any time.

To counter this dispositive motion on punitive damages, the Cotchett firm

asked for the development of a comprehensive interactive timeline that included hundreds of key evidentiary documents used to support the claim that while PG&E did not "know" of the missing welds, it was only through a constant disregard for safety practices that they did not discover such problems.

This timeline was prepared in a number of different ways for the court. First, we printed it out as two big blow-ups to use during the hearing. Secondly, we created an interactive version for display on screen. When the attorney clicked on the icons in the information boxes, excerpts from case documents would appear.

Finally, we also made a PDF version. The interactive PDF had all the documents

linked by date and could be provided to the court for later review while considering the motion. Every document in the interactive PDF was already provided to opposing counsel in the opposition papers, so the interactive PDF acted as a visual summary of the papers already submitted and not new evidence.

PG&E ultimately lost this motion.

Before mediation

Since 95 percent or more of cases settle at mediation, it is also essential to prepare for mediation as if it were trial.

Unlike a motion, where a judge very much dictates what the focus of a hearing will be, a mediation is controlled by the attorney who can focus the presentation as he or she chooses. Now that most



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2000 GPRP phased out.	2004 49 CFR Part 192.909(c) Operator must "identify all high consequence areas. . . [conduct] a baseline assessment. . . [identify] threats to each covered pipeline segment. . . [create] a process for continual evaluation. . ."	2006 ⚠️ Chi Hung Lee Memo contradicts PG&E stated policy in 1996 endorsing value and use of RCV's.	2009 ⚠️ Enterprise risk management report identifies risk of catastrophic event due to over-pressurization, leak or age of transmission line.	2010 ⚠️ Manufacturing defect discovered on line 132 - South San Francisco.
2002 PG&E initiated its Risk Management Program.	2005 ⚠️ CPUC Audits PG&E's Integrity Management Program: "The periodic evaluation reviewed by the team was not sufficiently thorough, complete, and adequately documented for identifying potential new threats. . ."	2008 ⚠️ 26 unknown leaks on Line 132 identified.	2009 ⚠️ Manufacturing defect discovered on line 132 - South San Francisco.	2010 September 9, 6:11 pm Explosion of gas line in San Bruno.
2002 ⚖️ "Each operator of a gas pipeline facility shall conduct an analysis of the risks to each facility of the operator." Pipeline Improvement Safety Act.	2008 ⚠️ PG&E - RMP 06 Sec. 3.5 required PG&E to assume existence of a manufacturing threat.	PG&E knew they did not have records of actual pipe designs, testing, drawings, manufacturing or safety testing for line 132		

2000s

2003 PG&E spikes pressure on line 132 to over 400 PSI.	2004 ⚠️ PG&E conducts External Corrosion Direct Assessment on Line 132 without ever inspecting the welds, but identifies 13 unknown leaks in the pipe.	2008 PG&E spikes pressure on line 132 to over 400 PSI.	2009 PG&E performs only corrosion inspection on line 132.
DANGER		DANGER	

What PG&E Did

every mediation room in the state has access to a big-screen TV, your ability to create powerful visual presentations is greatly enhanced. With a simple HDMI cable from your iPad or laptop, you can attach to the screen and easily show any graphics or presentation.

With a well-thought-out presentation using visual aids, you can control the argument before the other side even has a chance to talk. Here are some suggestions:

- For a joint session, develop a PowerPoint or Keynote that visually shows your case.
- Timelines (both interactive and static) are a great way to engage your audience and overwhelm your opposition before they start.

- Use a hard-board printout to support the electronic version of your presentation.
 - Upload all your well-organized electronic documents into trial software such as TrialPad (or its numerous good competitors like Exhibit A, Trial Touch or TrialDirector). With these programs, you can easily access any key document or medical record that may be at issue in the mediation.
- It's worth the time and effort to take those steps for mediation because you show the other side that you have complete mastery of your case, increasing the settlement value. It also gives you a good dress rehearsal if you want to use these tech tools at trial.

Before trial

For your major litigation case, preparing for trial by following the above advice is crucial. If you have done the work beforehand, your preparation for trial is largely done. You will have all of the documents electronically organized, and they can be imported into TrialPad or other iPad presentation software, or given to a trial tech who can do the same in TrialDirector or Sanction.

If you made timelines or other visual presentations for earlier stages in the litigation, then they can be modified into trial exhibits for use with the jury. Visual aids used for mediation or motions often are perfect to form an opening statement.



However, you'll face the hurdle of admissibility. While you can pretty much show anything you want at a motion or mediation, no jury will see anything unless it is admissible. The key holding from the recent Supreme Court case of *People v. Duenas*, (2012) 55 Cal.4th 1, explains the basic rule on what foundation is necessary to allow demonstrative evidence at trial:

A computer animation is not substantive evidence used to prove the facts of a case; rather it is demonstrative evidence used to help a jury to understand substantive evidence. In a case like this one, where the animation illustrates expert testimony, the relevant question is not whether the animation represents the underlying events of the crime with indisputable accuracy, but whether the animation accurately represents *the expert's opinion* as to those events. (*Ibid.*)

While *Duenas* deals with a demonstrative animation, the concept applies

to any demonstrative you intend to introduce at trial. The point of any visual is to support the testimony of some person at trial. Graphics, charts and diagrams can all be used to support testimony, especially of experts but also of lay witnesses who simply saw events and can testify that the demonstrative accurately represents what they saw.

The lesson? While preparing your case, think about each visual display you would like to have, and then consider which witness (or witnesses) might be able to provide the foundation at trial.

Conclusion

By building the electronic and visual foundation of your major case from an early stage of your major litigation case, you are constantly preparing your case for trial. Not only does this help prevent you from being overwhelmed as the trial approaches, it also helps you show the court and opposing counsel at each stage the strength of your argument and your mastery of facts.

For your next major case, take advantage of some or all of these recommendations to maximize the value to your clients.



Smith

Attorney Morgan C. Smith is president and founder of Cogent Legal, a litigation graphics and trial strategy firm based in Oakland. Cogent Legal (cogentlegal.com) develops persuasive state-of-the-art litigation

graphics, provides courtroom technology support, and consults with trial teams to help attorneys prepare and present their cases for maximum results. Previously, Morgan was a partner at The Arns Law Firm of San Francisco, where he excelled at complex litigation, class actions, personal injury and products liability.

