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DISPLAYING DIGITAL MEDIA DURING OPENING STATEMENTS: TACTICS, TECHNIQUES, AND PITFALLS

Joel Simberg*

INTRODUCTION

Beyond a doubt, the era of using computer technology for presenting evidence has arrived. Courtrooms around the country are increasingly becoming wired so that they are ready for the use of multimedia displays by litigants.¹ Even without advanced infrastructure, presenting electronic evidence in the courtroom can be as simple as using a laptop and a screen to project an image.

Moreover, it is clear that using multimedia presentations during opening statements is effective. Studies have repeatedly shown that combining a visual presentation with an oral presentation enhances the listening and learning experience for the audience.² It allows members of the audience to remember more, keeps their attention focused, and if done correctly, such presentations are more persuasive than a traditional oration.³

If such a multimedia presentation is effective, there is no reason not to use one in front of a jury at the first reasonable opportunity: open-

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1. See generally Fredric I. Lederer, *The Road to the Virtual Courtroom?: A Consideration of Today's—and Tomorrow's—High Tech Courtrooms* (unpublished manuscript 2002) “[T]he current trend is toward integrated high technology courtrooms. Depending upon the definition, as of April 1998, the Courtroom 21 Project had verified eight qualifying state facilities and approximately thirty-two federal ones. More have come on line since then.” *Id.* at 2.

2. See Matt McCusker, *Opening Statement? We've Got an App for That*, DELIBERATIONS BLOG (June 29, 2010, 4:45 PM), <http://jurylaw.typepad.com/deliberations/2010/06/opening-statement-weve-got-an-app-for-that.html> (“[I]nformation is retained at a remarkably higher rate when it is presented orally and visually (65% retention), rather than orally alone (10% retention) or visually alone (20% retention).” (citing HAROLD WEISS & J.B. McGRATH, JR., *TECHNICALLY SPEAKING: ORAL COMMUNICATION FOR ENGINEERS, SCIENTISTS AND TECHNICAL PERSONNEL* (1963))).

3. See generally Richard K. Sherwin et al., *Law in the Digital Age: How Visual Communication Technologies Are Transforming the Practice, Theory and Teaching of Law*, 12 B.U. J. SCI. & TECH. L. 227 (2006).

ing statements. Indeed, research has shown that most jurors make up their minds right after opening statements.⁴ But using multimedia during openings, as opposed to merely during the presentation of witnesses or during closing arguments, has its own set of pitfalls.

If you want to show an exhibit to the jury before it is introduced, do you need to lay a foundation for the exhibit, and how is that accomplished? What happens when a displayed visual is not introduced at trial? Do you run the risk of a mistrial or reversal? What are the discovery obligations when you use technology during an opening statement? Typically, there is no obligation to let your opponent know what you are going to say in opening statement as it may give away your trial strategy. Does the use of a multimedia presentation alter discovery obligations? Additionally, under normal circumstances, the record consists entirely of the court reporter's transcript and a physical copy of the exhibits shown, so how do you preserve the record when evidence is shown electronically?

For many of these questions, there may be no definitive answer. The discovery and evidence rules continue to evolve but are slow to adapt to the changing methods in which technology is being used. Case law, on the other hand, is beginning to emerge, but it is not extensive and it lacks uniformity. This Article attempts to address these issues. It also discusses the benefits and pitfalls of using digital media during an opening statement and makes some suggestions for how to display digital media effectively.

II. CONSIDERATIONS BEFORE TRIAL

A. *Will a Trial Court Allow the Display of Evidence to a Jury During Opening Statement?*

As a general matter, courts have wide latitude in determining whether to allow a party to display evidence or digital media during opening statements. As explained by Steven Lubet, "Since the purpose of [an] opening statement is to explain what the evidence will show, you are entitled to read from or display documents and other

4. Some research suggests that as much as 80–90% of jurors have made up their minds during or immediately after opening statements. Paula Hannaford et al., *The Timing of Opinion Formation by Jurors in Civil Cases: An Empirical Examination*, 67 TENN. L. REV. 627 (2000) (citing DONALD E. VINSON, *JURY TRIALS: THE PSYCHOLOGY OF WINNING STRATEGY* 171 (1986)). Other research suggests that jurors are only leaning towards one side. See generally HARRY KALVEN, JR. & HANS ZEISEL, *THE AMERICAN JURY* (1966); Valerie P. Hans et al., *The Hung Jury: The American Jury's Insights and Contemporary Understanding*, 39 CRIM. L. BULL. 33 (2003).

exhibits that you expect to be admitted into evidence.”⁵ This general rule is followed in the majority of federal and state jurisdictions.⁶ However, not all jurisdictions follow this general rule, and in some states, a prohibition on the display of evidence during openings (digital or physical) exists. In Texas, for example, an advocate is strictly confined to “briefly explaining the nature of his claim or defense and what he expects to prove and the relief sought.”⁷ As explained in *Guerrero v. Smith*,⁸

This rule does not afford counsel the right to detail to the jury the evidence which he intends to offer, nor to read or display the documents and photographs he proposes to offer. Where counsel is allowed to detail expectations in the opening statement, he places matters before the jury without the determination of their admissibility.⁹

A minority of states follow a similar rule.¹⁰

As discussed below, in the jurisdictions where a trial court has the discretion to allow the presentation of exhibits to the jury, the best procedure for digitally displaying exhibits during opening is to get judicial permission in advance.

5. STEVEN LUBET, *MODERN TRIAL ADVOCACY: ANALYSIS AND PRACTICE* 459 (3d ed. 2004). See also *Quinn v. Consol. Freightways Corp.*, 283 F.3d 572, 576 (3d Cir. 2002); *State v. Sucharew*, 66 P.3d 59, 63 (Ariz. Ct. App. 2003); *Billings v. State*, 697 S.E.2d 595 (Ga. 2005); *State v. Smith*, No. 26829, 2006 Haw. LEXIS 26829, at *2 (Haw. Mar. 26, 2006); *State v. Caenen*, 19 P.3d 142, 157 (Kan. 2001); *State v. Sibert*, 169 S.E. 410, 411 (W. Va. 1933); *James v. Heintz*, 478 N.W.2d 31, 35 (Wis. Ct. App. 1991).

6. See *Spence v. S. Pine Elec. Coop.*, 643 So. 2d 970, 972 (Ala. 1994) (blow up of deposition in opening); *Sucharew*, 66 P.3d at 63 (photographic exhibits used during opening); *Ark. State Highway Comm'n v. Basin Dev. Co.*, 571 S.W.2d 578, 579 (Ark. 1978) (permitting use of a map marked with locations of comparable sales during opening statement, which was subsequently referred to by an expert witness); *People v. Wash*, 861 P.2d 1107, 1125–26 (Cal. 1993) (photos of crime scene and crime victims); *McGee v. State*, 529 S.E.2d 366, 368 (Ga. 2007) (floor plan used during opening); *People v. Trent*, 734 N.E.2d 1, 9 (Ill. App. Ct. 2000) (photographs of deceased victim); *Parker v. Commonwealth*, 241 S.W.3d 805, 809 (Ky. 2007) (evidentiary materials can be used if the admissibility is determined before use); *Campbell v. Menze Construction Co.*, 166 N.W.2d 624, 626 (Mich. Ct. App. 1968) (approving the use of a damages chart during opening); *State v. Bjorklund*, 604 N.W.2d 169, 203 (Neb. 2000) (use of summary charts); *Heintz*, 478 N.W.2d at 35 (allowing the use of not-yet-admitted pictures in opening statement); *Stanfield v. Neblett*, No. W 2009-01891-COA-R3-CV, 2010 WL 2875206 (Tenn. Ct. App. July 23, 2010).

7. *TEX. R. CIV. P.* 256(a).

8. *Guerrero v. Smith*, 864 S.W.2d 797 (Tex. Ct. App. 1993).

9. *Id.* at 799. In *Guerrero*, the appellee’s counsel “surreptitiously” displayed a photograph of the appellee. *Id.* The court condemned this practice and said “this conduct should not have been tolerated by the trial court.” *Id.* at 800. The court nonetheless found that the error was harmless since the photo was later admitted into evidence. *Id.*

10. *Bell v. State*, 172 P.3d 622, 627 (Okla. Crim. App. 2007) (“We have held that prosecutors should not use exhibits in opening statement before they are admitted into evidence.”) (footnote omitted). See also *State v. Hawn*, No. 2002-P-0042, 2003 WL 22470962, at *3 (Ohio Ct. App. Oct. 31, 2003).

B. *Displaying Digital Media During the Opening Statement:
One Instance When It Is Better to Ask for Permission
Instead of Forgiveness*

It is fair to say that no one starts a trial with hopes of causing a mistrial and having to try a case twice. With that being said, it is also fair to say that if you want to attempt to display evidence to the jury during the opening statement, you should proceed with caution. A safe approach is to be forthcoming with the court and opposing counsel regarding the use of technology. If there are no surprises, then there are likely to be fewer problems. This is certainly true if you are the proponent of the use of technology, and being forthright makes sense for various reasons.

The timing of opening statements suggests that it is one of the few moments that you can be sure that you have the jury's attention. If the jurisdiction in which you are trying a case does not allow for attorney-conducted voir dire, it is also your first real chance to have the jury form an impression of you.¹¹ Moreover, the principle of primacy suggests that the opening statement is likely to be one of the aspects of the trial that jurors are most likely to remember.¹² There is no legitimate reason to have that first opportunity ruined by repeated objections from opposing counsel. If the judge sustains an objection, depending on how well you have worked out alternative methods to deliver your opening, the opening statement you have practiced may

11. Gregory E. Mize, Paula Hannaford-Agor & Nicole Waters, *The State-of-the-States Survey of Jury Improvement Efforts: A Compendium Report* (Apr. 2007). "[A]ttorney-conducted voir dire is common in state courts and judge-conducted voir dire is the norm in federal courts." *Id.* at 27. The authors go on to list eleven states that rely on predominately judge-conducted voir dire, eighteen states where both the attorney and the judge conduct voir dire, and twenty-three states where the attorney predominately conducts the voir dire. *Id.* at 28.

Even when attorney voir dire is allowed, the voir dire is often limited to discovering the biases and prejudices of the jurors, and lawyers are routinely prohibited from discussing the facts of the case, the claim for relief, or the defense. See Michael P. Toomin, *Jury Selection in Criminal Cases: Illinois Supreme Court Rule 431—A Journey Back to the Future and What It Portends*, 48 DEPAUL L. REV. 83, 95-99 (1998) (reviewing the permissible scope of attorney-conducted voir dire in Illinois). Thus, even when attorney voir dire is allowed, the opening statement is the first chance to fully apprise the jury of your case and why you should win.

12. Ariana R. Levinson, *Lawyering Skills, Principles and Methods Offer Insight as to Best Practices for Arbitration*, 60 BAYLOR L. REV. 1 (2008).

Litigation principles emphasize that whether listening or reading, people remember well the information presented first. . . .

[T]he opening statement at trial is critically important because it is the first information about the case that the jury receives. . . . This psychological effect is known as the primacy effect and goes hand-in-hand with the recency effect, such that listeners remember what they hear first and last.

Id. at 30 (footnotes omitted).

be gutted. In any event, you run the risk of having the court alter the way that you intended to deliver your opening statement.

Aside from the difficulties associated with fielding multiple objections during the opening, another more practical concern arises: the risk of a mistrial. When a party shows an exhibit during an opening statement, there is always a risk of creating error if that exhibit is not subsequently admitted.¹³ Because you cannot un-ring a bell or have jurors ignore what they saw, limiting instructions may not be sufficient and a mistrial may be the only just result.¹⁴ That risk can be eliminated with some advance planning and dialogue with opposing counsel and the court.

The easiest way to discuss the use of digital media during an opening statement would be the pretrial conference.¹⁵ Not all jurisdictions, however, have pretrial conferences. Do not let the lack of a formal opportunity to discuss the use of digital media and trial exhibits during opening lull you into thinking that non-disclosure is the preferred method. File a motion in limine that will bring the issue to the forefront.¹⁶ In the same vein, if the introduction of certain documents will not be contested, request a stipulation as to their admissibility.¹⁷ This

13. See *Parker v. Commonwealth*, 241 S.W.3d 805, 809 (Ky. 2007) (reversible error to play a CD before the jury when that CD was later not allowed into evidence).

14. *Id.*

This case falls squarely within the parameters of *Johnson v. Commonwealth*, 105 S.W.3d 430 (Ky. 2003). In *Johnson*, this Court found that ‘the presumptive efficacy of an admonition falters when there is an overwhelming probability that a jury cannot follow the admonition’ about evidence devastating to the defendant, or when the evidence is without a factual basis and is inflammatory or highly prejudicial.

Id.

15. The Federal Judicial Center has written an extensive manual on how judges should deal with issues relating to courtroom technology and conducting the digital trial. FEDERAL JUDICIAL CENTER, EFFECTIVE USE OF TECHNOLOGY: A JUDGE’S GUIDE TO PRETRIAL AND TRIAL 1 (2001). Federal judges are advised to go over technology issues early before litigation begins at a pretrial conference. *Id.* at 62. With respect to opening statements, it is suggested that judges and opposing counsel review all the slides that are intended to be shown prior to the opening along with any animations that are included on those slides. *Id.* at 156–57.

16. See ILLINOIS INSTITUTE OF CONTINUING LEGAL EDUCATION, CIVIL TRIAL EVIDENCE (ILLINOIS) § 8.41 (2009).

17. In cases where a party has complained about the use of evidence during opening statements, appellate courts routinely look to see if the evidence was subsequently admitted at trial. If so, any error is routinely found to be harmless. See, e.g., *State v. Sellers*, 877 N.E.2d 387 (Ohio Ct. App. 2007); see also *Bell v. State*, 173 P.2d 622 (Okla. Crim. App. 2007) (any claim of error regarding the use of a photograph during opening statement was waived when the photographs were either stipulated to or admitted without objection). In *Parker v. Commonwealth*, the court held that a stipulation or a determination regarding admissibility was a prerequisite to using evidentiary materials during opening statements. 241 S.W.3d at 809 (“This Court is stopping short today of saying that no aids or materials may be used in opening statement. However, it is necessary that when evidentiary materials are used, they must at least be authenticated or their admissibility determined before their use.”).

stipulation will increase the chances of admissibility of those documents during opening statements and drastically reduce the risk of having an objection sustained or causing a mistrial.

The same rules apply if you are opposing the use of digital media. Waiting to object when opposing counsel is in the middle of his opening statement will usually not be the best strategy.¹⁸ If possible, you should file a motion to preclude the use of exhibits to which you object, and also use opposing counsel's discovery obligations to determine what exhibits she will attempt to utilize and the manner in which she intends to use them.¹⁹

Another reason to rely on a pretrial conference or motion in limine, as discussed further below, is that courts have been far from uniform in their treatment of the use of digital media during opening statements. As such, unless you are familiar with the practice in a particular court or jurisdiction, knowing the ground rules before you leap is a prudent course of action.

C. *Does the Use of Captions on Photos Make an Exhibit Objectionable?*

If a trial court decides to let an advocate use digital media during an opening statement, a logical follow-up question arises: What can you do with the media? Of course, simply displaying evidence in digital form is appropriate. But with the use of technology and programs like PowerPoint or trial presentation software such as Sanction or Trial Director, it is easy to add annotations or animations that are descriptive and make the exhibits interactive and entertaining. However, does adding these effects make the use of an exhibit argumentative or objectionable? Courts do not answer this question uniformly.

In *State v. Sucharew*,²⁰ the prosecutor utilized a PowerPoint presentation during his opening statement. The PowerPoint presentation included photographs, a map, and a listing of the defendant's blood-alcohol content along with his physical symptoms.²¹ Superimposed over some of the photographs were words and labels that tracked the

18. See, e.g., *In re Air Crash at Lexington Kentucky*, No. 5:06-CV-316-KSF, 2010 U.S. Dist. LEXIS 3279 (E.D. Ky. Apr. 2, 2010).

19. See EFFECTIVE USE OF TECHNOLOGY, *supra* note 15, at 157. "Knowledgeable counsel will almost always request that the court review all graphics displays (not just those with motion and sound) to be used in opening statement. The most frequent exception occurs when counsel is planning to sandbag an unsuspecting opponent with graphics that might draw an objection. . . ." *Id.*

20. *State v. Sucharew*, 66 P.3d 59 (Ariz. Ct. App. 2003).

21. *Id.* at 63.

prosecutor's opening statement.²² After finding that the trial court had broad discretion over the conduct of the trial, the Arizona appellate court found that allowing the prosecutor to use the labels in his opening statement was not an abuse of that discretion.²³ It is noteworthy that the decision did not discuss whether the descriptive labels or words were ever testified to or authenticated; rather, the decision relied on the fact that the labels and words tracked the language of the prosecutor's opening statement.²⁴

In *Bell v. State*,²⁵ an Oklahoma appellate court reached the opposite result. In *Bell*, the prosecutor used a PowerPoint presentation during his opening statement, which included photographs of the scene and the victims.²⁶ In that presentation, the prosecutor superimposed labels and captions on those photos.²⁷ The court held that any complaint about the use of the pictures themselves was waived because the pictures were all admitted during the trial without objection, although the use of the labels and captions was improper.²⁸ According to the court,

This objection [to the labels and captions is] well taken. The photographs admitted to the jury did not have captions or written commentary of any kind, but were identified and explained by the witnesses. . . . [H]e should not have marked the exhibits with his own comments. Had he done so while seeking to admit the exhibits at trial, it would have rendered them inadmissible. It was no less improper to mark the exhibits which were used in opening statement as if they were trial exhibits.²⁹

A review of these decisions, along with the principles outlined above in this Article, leads to the following conclusions. First, if you are putting labels on or animating exhibits for use during an opening statement, judicial approval should be obtained. Courts have scrutinized the use of descriptive labels more closely than the use of exhibits themselves. Second, make sure that those labels are testified to during trial. The trend towards finding that any misuse of exhibits during opening statement is harmless error seems to apply to the use of descriptive labels as well as to annotations.

22. *Id.*

23. *Id.* at 64; *see also* *State v. Smith*, No. 26829, 2006 Haw. LEXIS 163, at *2-3 (Haw. Mar. 28, 2006) (slides of photos used during opening statement with text were proper because the text only communicated basic information).

24. *Sucharew*, 66 P.3d at 64.

25. *Bell v. State*, 172 P.3d 622 (Okla. Crim. App. 2007).

26. *Id.* at 627.

27. *Id.*

28. *Id.*

29. *Id.*

III. CONSIDERATIONS DURING TRIAL

A. *Ten Tips for Using Courtroom Technology*

Once you have decided to use a multimedia presentation during an opening statement, the question becomes how to best make such a presentation. While there may be little statistical evidence suggesting the appropriate way to present visuals during opening statements, simple experience teaches us that not all visual presentations are created equal.³⁰ Anyone who has sat in court, been to a conference, or attended any other forum where visual presentations are given knows this to be true. The phrase “death by PowerPoint”³¹ refers to putting your audience to sleep by using a boring and dull presentation.³² Simply having a visual presentation is not enough—it must be effective and persuasive. The following tips have been formulated from practical experience and from many hours of watching lawyers and students use visuals during opening statements.

1. *A PowerPoint or Multimedia Presentation Is Just an Aid to Help Your Presentation*

The most important thing to note about using multimedia presentations during an opening statement is that PowerPoint slides, audio files, and other audiovisuals are merely an ancillary aid to your presentation. Yes, they can improve your presentation, but it is the believability of the advocate, the connection she makes with her audience, and the persuasiveness of her arguments that will win the case. The multimedia portion of that presentation is just an aid to accomplish the goals of the presentation.³³

30. For a discussion of the most effective way to present information and criticism of the use of common techniques, see, for example, EDWARD R. TUFTE, *THE COGNITIVE STYLE OF POWERPOINT* (2003).

31. Angela R. Garber, *Death by PowerPoint*, SMALL BUSINESS COMPUTING.COM (Apr. 1, 2001), <http://www.smallbusinesscomputing.com/biztools/article.php/684871/Death-By-Powerpoint.htm>; see also David J. Heller, *A View from the Trenches: Effective Communications and Training* 483 (Practicing Law Institute, Corporate Law and Practice Handbook Series No. 14462 2008).

32. PowerPoint seems to be the most common program used for opening statements. Its linear presentation allows the presenter to deliver his opening speech with a rehearsed slide-by-slide presentation, which is particularly well-suited for opening statements. The tips in this Part were primarily developed for people using PowerPoint but will work with any presentation software.

33. Edward R. Tufte is a Professor at Yale University and a respected expert in the fields of informational design and visual communication. He has written extensively on the use of PowerPoint and the harm caused by overreliance and the poor use of PowerPoint. In his article, *PowerPoint Is Evil*, he explains,

It also is important to remember both the forum and the audience. This is not a sales pitch, a classroom lecture, or a strategic briefing. You are in a courtroom. Your goal is to advocate for your client's position. Your audience did not come because they chose to volunteer. They responded to a summons and most of them would rather be somewhere else. You need to capture their attention but remain persuasive and believable. Your audience's entertainment might be a factor in your presentation, but entertainment alone should not be a primary motivator.

2. *Using the "Black" Slide*

Anytime something is placed on a projection screen in a courtroom, that screen commands attention. It moves the focus away from the presenter and to the screen. In order to capture the attention of the audience, it is most often sensible to start a presentation with a blank, black slide.³⁴ This allows you to control the focus of the audience and not have them looking at a presentation screen when they should be focused and listening to you. The same is true as you introduce new slides throughout your presentation. When you are finished with a particular slide or point, remove it and insert a blank slide. This will maximize the chance that your audience is focused on you and not just paying attention to the screen.

3. *Practice with the Equipment You Will Be Using*

Different computers will react differently to certain materials. Resolution settings, as well as different versions of media players can all affect the display of a presentation or whether digital media will play at all. The same is true for display screens. What looks like a clean image on your desktop or laptop monitor may not look the same when displayed by a projector or LCD screen. Colors can appear different and may wash out on certain displays and be difficult to see.

At a minimum, a presentation format should do no harm. Yet the PowerPoint style routinely disrupts, dominates, and trivializes content. Thus PowerPoint presentations too often resemble a school play—very loud, very slow, and very simple.

The practical conclusions are clear. PowerPoint is a competent slide manager and projector. But rather than supplementing a presentation, it has become a substitute for it. Such misuse ignores the most important rule of speaking: Respect your audience.

Edward R. Tufte, *PowerPoint Is Evil*, WIREd, Sept. 2003, at 112.

34. Black is the preferred color of a blank slide because it will look to the audience as if the projector is off. So that the presenter can know that the projector is working, it is recommended that he put an innocuous small dot or symbol in the lower right corner, which can be seen but is not distracting.

One solution to such problems is to arrive in court early and practice with the actual equipment you will be using at trial.³⁵

4. *Plug in Your Computer and Turn off Distractions*

Laptop batteries fail. Running video and images can easily drain a power source. Due to the court's schedule or other unforeseen circumstances, your opening statement may get delayed and not be delivered when originally planned. Do not let the presentation you planned be sabotaged by a dead battery.

The same is true for screen savers and virus scanners. Turn them off. Your presentation should not be interrupted by a screen saver that is activated because your computer has gone into sleep mode or by a dialogue box that explains that your computer is checking for viruses.³⁶

5. *Use Font Sizes That Are Readable*

Each courtroom will be set up differently. This can be true in terms of the available technology as well as the distance the jury will be from a presentation screen. Sometimes there will be a large presentation screen for the jurors; other times the screen size will be more modest. In some jurisdictions, jurors will have individual monitors right in front of them. In all cases, you want your audience to be able to follow your text and captions. As a general rule, a minimum font size of twenty-six for all text is recommended.

6. *Avoid Flash and Distracting Transitions*

PowerPoint can be a very entertaining tool. There are literally hundreds of different transitions and ways to have an object appear on a screen. For example, the transition between slides can occur with a spin, twirl, fade, dissolve, or a bevy of other effects. Likewise, objects appearing in the individual slides can boomerang, fly in, spin, grow, shrink, crawl, or wipe. Sound can be added for each letter that appears, or objects can appear with a bang or explosion. However, just because you can do something in PowerPoint does not mean that you should. If those effects have a purpose and further the argument you are making, then use them, but most of the time they will not. Flashy

35. FEDERAL JUDICIAL CENTER, *supra* note 15, at 118.

36. On most Windows-based machines, the setting for your screen saver can be managed through the control panel. Virus scanners are often managed by opening the particular program and changing the settings.

transitions and effects tend to be a distraction, not an enhancement to your presentation.³⁷

7. *Keep Text to a Minimum*

As stated previously, multimedia presentations should be an aid to your oral presentation. You should not let the members of the audience lose focus on your story and presentation because they are looking at a screen and trying to follow along with repetitive text. The best slides are visual and express a theme or display an image that the jury can place in context as the trial unfolds.³⁸ You will split a jury's attention by having it attempt to read long sentences while you are explaining your position. While better than long passages, the use of bullet points does not completely solve the problem either. Thus, the use of text should be kept to a minimum and should be used only when necessary.

An exception to the use of minimal text is the displaying of jury instructions. Although the displaying of jury instructions during opening statements is a questionable practice,³⁹ when you do quote a jury instruction, that quote must be accurate.⁴⁰ An acceptable practice regarding jury instructions is to display or read the entire jury instruction and then highlight the specific points that are important to your case.

8. *Control How Text Appears on the Screen*

Even when you keep text to a minimum, you may nonetheless choose to use some text. Simply putting up all the text you want on a screen is probably not the most effective way to make the point. When you do so, your audience is most likely to read ahead of the point you are making and may not concentrate on what you are saying at a particular time. This problem can be solved by controlling the timing with which the words appear and remain on the screen.

37. Professor Tufte explains that flashy effects will not save a presentation that is otherwise lacking in content:

Presentations largely stand or fall on the quality, relevance, and integrity of the content. If your numbers are boring, then you've got the wrong numbers. If your words or images are not on point, making them dance in color won't make them relevant. Audience boredom is usually a content failure, not a decoration failure.

Tufte, *supra* note 33, at 118.

38. See CLIFF ATKINSON, *BEYOND BULLET POINTS* 5–19 (2008).

39. See 88 C.J.S. *Trial* § 300 (2011); 75 AM. JUR. 2D *Trial* § 432 (2010) (“It is not the function of opening statement to . . . act as argument on the case or an instruction as to the law of the case. . .”).

40. See THOMAS A. MAUET, *TRIAL TECHNIQUES* 395 (8th ed. 2010).

If, for example, you have four points to make and choose a bullet list to accompany your oral presentation to make those points, you can have each bullet point appear one after the other as you control the timing of when each point appears. After you move to your next point, you can keep the prior point on the screen. With this method, your audience knows where you are in your presentation and still has the ability to go back and remember what you said. You can also use a secondary effect such as dimming to let the jury know what point you are on while helping them retain the prior points that you made.

9. *Avoid White Backgrounds*

When possible, avoid white backgrounds. Particularly with LCD or plasma display screens, white backgrounds can become difficult for your audience to look at for an extended period of time. If using text, a white background with black text also makes it difficult to read from a distance. Instead, use a black or blue background because it is easier on your audience's eyes and has the added benefit of making the transition to your "blank" slide less harsh.

10. *Do Not Use a CD/DVD Drive to Run Your Media*

Optical drives such as a compact disc or DVD drive tend to run slower than a hard drive or flash drive and take longer to send information to the screen. So, for example, if you are attempting to play a video or audio file during your opening statement, playing the file on a CD or DVD drive rather than a hard drive or flash storage can cause a delay. These drives are also harder to manipulate if you find yourself needing to locate a specific segment of an audio or video file.⁴¹ It is easier to manipulate an audio or video file that is stored digitally on your hard drive or similar storage device than one on a CD or DVD drive that is read optically. Additionally, CDs and DVDs are not as stable as hard drives or flash storage. They are subject to scratching, cracking, and harm that can destroy the content of a particular file.

IV. POST-TRIAL CONSIDERATIONS

A. *Preserving the Record*

As with any aspect of a trial, preserving the record for appeal can be a critical issue. For both sides, the issue becomes slightly more

41. If there is a possibility that you will need to rely on a particular segment of an audio or video file, the best practice is to make a clip of that segment before trial and be able to play that clip as needed.

complicated when a party uses electronic media during opening statements.

When physical exhibits are utilized during the presentation of evidence, there is little difficulty in preserving the record. The procedures utilized to establish the foundation for the exhibits themselves are usually sufficient to preserve the record. For example, counsel will typically attempt to introduce an exhibit by first declaring that she is showing the exhibit to opposing counsel (for example, "I am showing counsel what has been marked for the purpose of identification as Exhibit 1"). She will then have the witness identify the exhibit and establish its authenticity before moving for its admission into evidence. When the witness marks the document, counsel will explain for the record any markings the witness makes (for example, "Let the record reflect the witness has marked with a red 'X' the location she was standing when the accident happened"). At the end of the trial, the marked exhibit is impounded and available to the appellate court for review.

With the use of digital media, other issues arise. For example, if the witness marks an exhibit on a presentation screen with the use of a mouse or an annotation device, will a hard copy of the marked exhibit be available for the appellate court or even the jury once deliberations begin? The easiest solution to this is to have a printer in the courtroom to print out the images after they have been marked.⁴² This ensures that the document is available for the jury and for appellate review. This method is also preferable to saving a digital image and requiring the jury or an appellate court to look at the document on a laptop or off of a CD. It would be unwise to expect that the jury will load evidence on a laptop to review it while deliberating when a hard copy can be made available so easily.

Using digital media during opening statements only complicates the matter. While counsel would usually refer to an exhibit by number when examining a witness, this is much less likely to be true during the course of an opening statement. Stoically exclaiming, "I am now

42. There are various ways to capture an image from a screen for printing, and the most common trial presentation programs have ways to create a screen capture. In the program Sanction, for example, hitting the F7 key will capture a screen exactly as it is seen at the time the key is hit. In Trial Director, if you click on the camera icon in the presentation toolbar or type ".GS" on the screen you will accomplish the same thing. When in doubt, in Microsoft Windows, if you hit the "print scrn" button, you will load a screen capture onto the clipboard, and that image can be copied into a document or program to be printed out. Using this method is not particularly efficient, however, and the clipboard will only save the last image captured. Therefore, you would have to paste the image into a new document after each time you hit the "print scrn" button.

showing you what you will later see as Exhibit A,” during an opening would clearly hurt the flow of the presentation. Rather, it is more likely that the advocate will simply describe the exhibit. Take, for example, an autopsy photograph that is used during a murder prosecution. The picture is graphic. It shows the victim’s skull removed and all the skin peeled back. The eyes have been removed from their sockets. Dried blood can be seen on the remaining areas of the face. The photo is relevant because it allows the jury to see the course of the fatal bullet. During opening, the prosecutor may simply describe what is shown in the exhibit:

Ladies and gentlemen, after the victim died, an autopsy was performed. Autopsies are important because they look at things like the cause of death. And when you do an autopsy you can determine various things. In this case, the autopsy was well documented. Numerous photos were taken, and by looking at one of those photos [photo is displayed to the jury], you can tell that the fatal bullet entered from the top back portion of the victim’s head, traveled through the skull, and exited between the victim’s eyes.

If this example were true, an appellate court would have no way to determine which of the many autopsy photographs was used by the prosecutor.⁴³ If opposing counsel was to later assert that this photo was unfairly prejudicial due to its gruesome and graphic nature, she must be able to demonstrate which specific photo was used. Moreover, if the prosecutor were to highlight or animate that photograph, perhaps to show the bullet’s trajectory, those highlights and animations need to be preserved.

One of the most common programs for presenting digital media during opening statements is PowerPoint.⁴⁴ Its linear functionality is exceptionally well suited for presentations that can be rehearsed in advance. Saving PowerPoint presentations to a CD or flash drive to be later impounded is not complicated, but depending on the content of your presentation, simply dragging and dropping the PowerPoint presentation onto a CD or flash drive might not be sufficient.

When you insert various media file types into PowerPoint (such as video or audio files), PowerPoint does not copy the media into the PowerPoint presentation. Rather, it creates a link that allows the pro-

43. Just because all of the autopsy photos are later admitted into evidence does not mean that it becomes unimportant which photo is used during the opening statement. Perhaps the error would have been harmless if it was just one photo in the course of hundreds of exhibits and only shown to the jury for a few seconds over the course of an extended trial. But when that same exhibit is shown, highlighted, and commented upon during opening statements, the error may no longer be harmless.

44. NATIONAL INSTITUTE FOR TRIAL ADVOCACY, EFFECTIVE USE OF COURTROOM TECHNOLOGY: A LAWYERS GUIDE TO PRETRIAL AND TRIAL 271-73 (2002).

gram to locate the media and play it within PowerPoint. When a PowerPoint presentation is copied by dragging and dropping the presentation onto a CD, the linked files will not necessarily transfer and the links will be broken. So, when an appellate court attempts to review the presentation, the linked media may be lost. Additionally, there is no guarantee that the appellate court that later reviews your presentation will have PowerPoint and be able to view your presentation.

The solution for both of these issues is to use the “publish to CD” function.⁴⁵ By publishing to CD, you can include all linked media, and the CD package will include a copy of “PowerPoint viewer,” which allows people to view your PowerPoint presentation even if they do not have the program on their computer. Additionally, you can password protect your presentation to ensure that no one will edit your presentation after it has been impounded.

V. CONCLUSION

Using multimedia presentations during opening statements can be an effective and compelling way to present your case to a jury. Although such presentations will not win cases by themselves, they can be important tools in the advocate’s arsenal. If done correctly they help to keep the trier of fact engaged and make arguments more effective. To be effective, they must be done well and be delivered smoothly. The smart advocate will avoid common pitfalls and make sure that his equipment functions as expected.

As the discovery and procedural rules for using multimedia presentations evolve, clear answers to counsel’s discovery obligations and the procedures needed to introduce electronic evidence during opening statements will emerge. If you are going to use a multimedia presentation during an opening, it is sensible to inform the court in advance and to make sure that the exhibits displayed during opening are actually admitted. Failure to do so presents the risk of having to respond to needless objections or of causing a mistrial. Finally, if a

45. The steps to publish to a CD are simple. First, with your PowerPoint presentation open, click on the “Office” button, which is found in the top left corner of the PowerPoint program. Second, scroll over “Publish” in the drop-down menu and choose “Package to CD” from the dialogue box. Third, the default setting copies all linked files and a PowerPoint viewer with the packaged CD. If you do not see a dialogue box that indicates that the linked files will be copied, go into options and check the appropriate boxes. Finally, if you are copying to a CD, insert a blank CD and click “copy to CD.” If you are copying to a flash drive or other storage device, click on “copy to folder” and locate the storage device.

multimedia presentation is used during opening statement or any other part of the trial, be sure that the record is properly preserved as the traditional methods of preserving the record may not be sufficient.