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Color by color, paint the jury a picture in opening

WATCH THE DEFENSE STRUGGLE WHEN THEY REALIZE FROM YOUR OPENING THAT THIS TRIAL IS NOT "LIKE EVERY OTHER ROUTINE SLIP AND FALL"

There are two parts to a premise-liability opening statement: the canvas and the painting. This is meant to underscore that the canvas, while foundational and instrumental, is never as important as the painting. The canvas is the premises, the painting is the people.

Premise-liability cases, like all personal-injury cases, are driven by the jury's emotional investment in the person who was hurt and rejection of the defendant's conduct that led to the injury. It is not driven by how much water was on the floor, the size of the hole that was left uncovered, or the amount of time in between sweepsheet entries. These are necessary facts, but not what tells the jury what the case is *about*.

A powerful opening statement can and should tell the jury exactly what the case is about. It should be a rough painting by the end, where what is left to do is let the jurors complete the artwork throughout the trial. Canvas and paint, together, make a picture that will eventually form full justice. This article will illustrate achieving harmony with both those ideas to produce a noteworthy verdict.

The canvas

In days of my youth, at least on TV, it seemed as though every judge was loading up a school bus and taking the jury on a "scene view." Juries would regularly be transported to the scene of the crime, accident, or dispute. Invariably, that is exactly where the case would be solved or at least revealed, to the trier of fact. Those days, like those TV shows, are long gone. While California law still permits scene views – and unlike its criminal counterpart law, you can even get testimony at the scene – good luck finding a single judge who allows it. (Code Civ. Proc., § 651; *Neel v. Mannings, Inc*. (1942) 19 Cal.2d 467; *Rau v. Redwood City Woman's* Club (1952) 111 Cal.App.2d 546).

In a premises case, where the scene is literally one of the tortfeasors, it can be a significant challenge to bring the jury to the canvas. Sure, you may have photos, but often by the time they are relevant to a jury the hole has been filled, the water dried, or the photo of the crack does not appear as menacing in expert-driven daylight photos as it did at dusk when grandma was walking the dog. Without the ability to literally deliver your jury to the scene of the injury, how do you set the stage and bring an inanimate object (a "premises") to its dangerous, unsafe condition, in the eyes of 12 strangers who have been picked, in part, on the basis of their *unfamiliarity with this particular premises?*

A canvas is built – take your time and do it right

In nearly all cases, I believe in a thorough, visual opening statement that leaves no stone unturned and brings the jury directly to the site of injury. Some research suggests that as many 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).) Regardless of whether "minds are made up," there is no dispute that jurors are influenced to one side or the other. What an opportunity to seize rather than be squandered!

While a case can certainly be lost with blunders later on, you should feel as though the jury has every fact upon which to make a decision by the time you sit down at the conclusion of your opening. Further hardening my belief is the satisfaction of sitting down and watching the defense give their opening, which is always subpar. The defense will sheepishly and embarrassingly attempt to weasel off their lack of preparation and usually begin by trying to win a cheap point by sputtering off the classic "I won't be nearly as long as Mr. Bruno."

The jurors will smile and a few may even chuckle, but that is only because the jurors *still expect* to be *persuaded and informed* by the defense, albeit in less time. Instead, the jurors are far from persuaded and even the little time spent by the defense attorney is a total waste of time. The defense is thus exposed for being unprepared, unpersuasive, and lacking credibility. One can waste everyone's time with a 10-minute opening, or use it wisely in an hour.

The jury only gets two opening statements – they will compare each against the other. The difference between you and defense lies in your preparation, practice, and delivery. Give the jury the information they need. Take them to the scene of the injury and introduce them to the people they need to care about. The jury will only be "worried" about time if you tell them to be. By the time defense pulls out that lousy argument, your opening statement is finished and all the jury can remember is how much they like you and your client.

A clear example of a jury's lack of care for the time spent in opening statement can be found in a case tried not too long ago. In *Sidlo v. Casa Blanca Builders*, a case where my client put his foot in an uncovered hole about one foot in circumference and one foot deep, my opening statement was aided by Keynote (the Mac Version of PowerPoint) of course, and was about an hour long.

The defense, unaccustomed to that (how much can you say about a small

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hole?), stumbled through 15 minutes of deficient content, such as "I'm going to remind you of your grandfather" (defense counsel was six years older than me) and "I'm going to step back here. I have some notes. I do it to keep me disciplined to honor your time to go – to move a little bit quicker. It's not comprehensive. It's not exhaustive. I'm not telling you that it's every fact, but I think it's big facts. This was not an exhaustive description of all of the facts of the case. It's to give you an idea of the facts of the case."

Defense counsel used a lot of words, just to tell the jury he was wildly unprepared. Perhaps he thought it wasn't worth his time, as my client had only stepped in a small hole and his injuries were what defense considered to be merely a torn meniscus and lumbar disk bulge resulting in a discectomy. Maybe it wasn't worth his time, but it was worth mine. The verdict was $11,821,664.10, plus years of 998 interest and costs. My opening statement showed the jury that I knew what I was talking about and more importantly, gave them the basis to follow my stroke and direction during the rest of the trial, as I would paint them the picture they needed to see to do their job. Lesson confirmed – you can never be too thorough.

The visual canvas

Using Keynote, I preselect all of my visuals in a persuasive manner that tells the story of where this injury happened. I embrace silence to let the jurors soak in the scene, letting pictures speak for themselves, and then provide accompanying narration. Your images should be persuasive and/or informative. If they are neither, then they are useless and should not be in your opening.

Occasionally, you will get a judge who is from the dark ages and will essentially award the defense veto power over your presentation because "nothing has been introduced in evidence yet, so Mr. Bruno can't show any exhibits to the jury." Of course, this is nonsense. Would that judge refuse to allow the DA to show photos of the crime scene in a criminal case, simply because the defense objected and "nothing is in evidence yet" or not allow the 911 call to be played, or a photo of the autopsy or weapon? Not on your life. The DA would paper that judge out of a job if he or she gave that much power to the defense, and it would never happen. So why on earth is it acceptable in a civil case? It is not.

Cite to the judge that it is permitted and they can take a look at Cal. Judges Benchbook Civ. Proc. Trial § 7.22, which allows for exhibits to be used when exhibits have been pre-admitted (a good idea); the attorneys stipulate (the defense rarely does because they do not prepare a PowerPoint) or, most importantly, *the judge's permission has been obtained*. The last one is the key.

Here is how you obtain the judge's permission: 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." (*People v. Arnold* (1926) 199 Cal. 471, 486.) The use of matters which are admissible in evidence, and which counsel has a good faith belief will subsequently in fact be received in evidence, may aid this purpose. (*People v. Green* (1956) 47 Cal.2d 209, 215.) In a premises case, electronic presentation and use of visual aids will assist the jury to follow the evidence and should therefore be allowed. Is there any dispute that a photo of the sidewalk where the client fell or the uncovered hole he put his foot in will *not* eventually come into evidence? These are documents and photos that your client can identify, authenticate, and seek admission of, *in every case*. So why pretend like this will not happen? There is no danger that the photos you seek to use in opening will *not* come in. This is not controversial at all.

People v. Green is helpful: As stated above the purpose of opening statements is to prepare the jury to follow the evidence and courts have held that using admissible evidence may aid in this purpose. (*People v. Green*, *supra*, 47 Cal.2d at 209, 215.) Courts have applied this logic to allow, "use of photographs and tape recordings, intended later to be admitted in evidence, as visual or auditory aids is appropriate." (See *People v. Fauber* (1992) 2 Cal.4th 792, 827.) In *People v. Walsh*, a California Supreme Court case, the trial court allowed the prosecutor to use a taped confession, photographs and slides in opening statement, and this use was upheld as proper by the Supreme Court. Of course, if it is acceptable in a murder case, it should well be acceptable in a "slip and fall" at Target.

With the court's permission, you have the foundation of your canvas. You can take the jury to the scene using the photos of the scene, the lighting and other conditions that make the canvas rich and ready to be painted upon. You use the courtroom to augment your presentation in the PowerPoint and really bring the jury to the danger that the condition presented. What's more, you are in effect showing the jury what danger they would actually face if confronted with the same condition. You are ready to paint.

A "premises opening" is about the people – your client and the defendant wrongdoers

One thing all excellent premises cases have in common is the same thing that all personal-injury cases have in common: The trial lawyer has done an excellent job of making the jury care about the person who was injured and systematically explains what the defendant did wrong. There have been volumes published on this, here and in other excellent sources, like Trial Guides, the CAALA list serve, etc. This article is limited to an opening on a premises case, so it is not exhaustive due to page limitations, but all good lessons applicable to any great case, obviously apply here.

You need to methodically dismantle the opposing experts and witnesses, using visuals of their videotaped depositions for effect. Videotaped depositions are a must for trial and for use in focus groups to

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prepare for trial and you are permitted to use them for virtually any witness ("party-affiliated") that testifies on behalf of the defense. (See Code Civ. Proc., § 2025.620, subds. (b) and (d); or when no other provision is available, Code Civ. Proc., § 2025.620, subd. (c)(3) that provides a "catch all" exception for the use of a non-party's deposition for any purpose: "Exceptional circumstances exist that make it desirable to allow the use of any deposition in the interests of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court.") Use videotaped deposition testimony, surgically edited, in your open.

In my openings, I tread lightly but nonetheless thoroughly on my client and her plight. Rather than tell the jury what my client "went through" in open, I show them through medical illustrations, photos of the accident, injury, and aftermath, and I tell the jury through the *words of others, not the words of my client*. Meaning, I will show a photo of witnesses that I expect to testify about the harms and losses, where I briefly spell out what those witnesses will testify to, in general terms. I am not looking for tears in the audience, I am looking for a sense of gravity. In my mind, I am trying to *communicate* the following with pictures and words: "This "slip and fall" case is real. It resulted in a serious and life-changing injury. That is what this case is about, and you will learn that through the testimony of people who have no stake in the outcome – just caring people who have seen the resulting devastation of the defendant's carelessness, inflicted upon a person who did not deserve it, nor ask for it. Through no fault of her own, she has had her life changed."

I find it ineffective to attempt to elicit an emotional reaction to my client in open, or at least I have not been successful at it yet. It is either there or it is not. Of course, if you have a quadriplegic case, the jury will be emotional, but *you did not elicit that.* Most of the time, your client looks normal, so going back in time and getting teary-eyed in open because your client had a two-level fusion, will miss the mark – at least at that point in the trial.

Instead, I explain what she was doing when she encountered the dangerous condition. Whatever it was, it is likely something jurors have done on thousands of occasions. I usually "stop time" at that point and give a corollary explanation of what the defendant was doing at that same time (ignoring the wet bathroom floor, cutting corners on inspection, or engaging in just plain carelessness) while dovetailing into what they should have been doing. I slow down and use the courtroom to move and diagram how one could easily succumb to the same injury. This is your time, and you won't get to speak to the jury directly again until closing, so embrace that. Show them how even an athletic person can trip over a clandestine condition. A slip and fall or trip and fall is a visual "accident." Unlike an MVA, where you can't effectively simulate a truck hitting a Honda, you can simulate many premises accidents with your own body, in court. Do it. Then toggle back to your screen where you have the actual scene photos. You are explaining to the jurors without saying it: "This could have been anyone, including you."

In a premises case, you can usually hold the defendants to a very high standard because it is typically the standard that they have articulated in their policy manuals and procedures and defended in their depositions. Defendant Policy Manuals are great fodder for opening statements. You know they will come into evidence (through the defendants themselves and the experts or as statements of a party) and it will illustrate for the jury what the defendants themselves have had to say about how they were required to perform their job to ensure public safety. Manuals are goldmines and there is usually no better illustration of "what should have been done" vs. "what was actually done" than the policy manual. Moreover, every aspirational policy is written to protect the public and avoid injury. So, the policy that was violated resulted in exactly the harm that the policy sought to address! Policy manuals are a good way to introduce the jury to the absolute best version of the defendant – the version that did not exist on the day that your client was injured and the version that the defendant will spend much time contorting himself into a pretzel at the time of trial to either minimize the importance of his own policies or, against all evidence, try to claim that he acted in accordance with those polices.

Tell the jury what kind of case this is not

Most jurors hate "slip and falls" or "trip and falls." Just the mention of those phrases screams fraud in the minds of some and "she should have been looking where she was going; she got what she deserved" in the minds of others. This is unfair, but reality. To help combat this in opening statement, I will often pause toward the end of opening when the jury has heard what kind of case this is, and look the jury in the eye and say something to the effect of: "This is not the type of case where someone was picking grapes from the supermarket stand, spilled a bunch of grapes on the floor, then slipped on them and is now blaming the supermarket." Or, "This is not one of those cases where someone looked around, saw no one was looking and 'tripped' in a small crack in the Staples Center floor – no one would subject themselves to the injuries Mrs. Bonilla had for that nonsense."

The key here, is to give your example of what kind of case this is not and you get out in front of the surefire defense allegations of your client's fraudulent or inattentive behavior. Do not dwell on it. But for those jurors who can't hear "slip and fall" without hearing "fraud" you have given their mind permission to let that go. I even try to do this in voir dire, and I repeat it in opening to remind those who have been selected that my client is not a grifter or a "woe is me" malingerer.

Opening statement is so important that you must be the side that frames

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what the case is about and what it is not about. Professor Steven Lubet's well-received book, Modern Trial Advocacy, spends fifty pages on opening statements and fifty-five pages on closing arguments, describing an effective opening statement as "crucial" to success at trial. Setting jurors' minds at ease that this is not a fraudulent case is a crucial part of "what the evidence will show."

Once you have told the jury what the case is, and what it is not, you should be able to glance back at your handiwork turned into an impressive painting. You now get to sit back and watch the defense struggle because they assumed your opening would be "like every other routine slip and fall." Enjoy watching them flail from your view at counsel table; it will pay off by the end.

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