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"Objection overruled" – The use of demonstrative exhibits in opening statement

A look at the authorities for using exhibits in your opening statement

By Tom Brandi

The final slides were in the order the way we wanted. The video deposition cuts looked sharp. The computer was ready. The screen was in place. All last minute details were checked. The jury sat waiting while the judge intoned "And now we will have opening statements for plaintiff."

I stood, walked slowly to face the jury, looked carefully at the jurors, felt the ever-present butterflies in my stomach that reminded me another opening was beginning, and was just about to start when I heard a voice from the defense table,

"Your honor, may we approach?" The judge agreed and defense counsel said, "It appears Mr. Brandi's going to use exhibits in his opening, and that is not appropriate."

The judge looked at me and inquired, "Well, are you?"

"Yes," I replied incredulously.

"Well, we will have to discuss this," said the judge, as he turned to face the jury and told them they had to step outside, and I watched them leave with puzzled looks on their faces.

Defense counsel again told the judge it was inappropriate to use material that was not yet admitted in evidence and the judge asked, "What are you proposing to show the jury?"

I said I was using exhibits from discovery that were pre-marked and covering subject matters already vetted by the rulings on motions in limine, video cuts from deposition videos that had already been approved for objections, both of which defense counsel had seen, and the rest is my work product.

Defense counsel again stated that was inappropriate to do because an opening statement was an "overview of the evidence, not the evidence".

The judge then asked me for an offer of proof as to exactly what I was going to say. I indicated that it was inappropriate for me to have to tell the defense my opening but the look on the judge's face told me he was not persuaded and he again asked me for the offer of proof. Reluctantly I complied and set forth a mini version of my opening statement.

The defense then objected again saying it was improper and that an opening statement was a verbal presentation and there was no authority for the use of materials not admitted. I have tried cases to verdict in 17 separate counties and several Federal Courts and never had this happen before. I literally could not believe what I was experiencing. The judge then said it appeared it was inappropriate to use these exhibits and asked whether I had any authority for their use.

I then reached into my trial bag for my trusty *Trial Wheel* authored by Bob Arns and said, "*People v. Green* 47 Cal.2d 209 (1956)."

The judge then left the bench came back five minutes later, and cited the following:

> Over objection the prosecuting attorney, in connection with the opening statement, was allowed to show the jury a motion picture depicting locations where the events in question took place and articles which were subsequently introduced in evidence as exhibits. Later the film was properly identified and admitted into evidence. Also in connection with the opening statement, the prosecuting attorney showed photographs of the wounds of deceased and of defendant in prison garb.
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> 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. (*State v. Sibert* (1933), 113 W.Va. 717 [169 S.E. 410, 412].) 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 [250 P. 168]), and the use of matters which are admissible in evidence, and which are subsequently in fact received in evidence, may aid this purpose. In the circumstances, we conclude that it was within the discretion of the trial court to permit the use, in connection with the opening statement, of the pictures which were subsequently received in evidence.

"Objection overruled, go ahead, counsel."

Brandi

Tom Brandi is a San Francisco trial attorney whose verdicts include seventeen over one million dollars. He has won over 150 settlements in excess of one million dollar and has been elected to membership in the International Academy of Trial Lawyers, the American College of Trial Lawyers, and the American Board of Trial Advocates. He is a past president of the Consumer Attorneys of California and the San Francisco Trial Lawyers Association. www.brandilaw.com

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