



Game changer: Animations in litigation

When to use them at mediation, and how to get them admitted into evidence at trial

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[Editor's note: Don't fail to look at the animations discussed in this article. Look for this article on www.plaintiffmagazine.com and click on the hyperlinks to see the videos.]

In 2012 the California Supreme Court opened its door to the 21st century by acknowledging how modern juries digest information. In *People v. Duenas*, the Court held that animations reflecting expert testimony may be shown to a jury as demonstrative evidence. Defendants' objections to the admissibility of animations due to lack of foundation, misleading re-creation, misstating testimony, etc. are now no longer considered by trial courts. The *Duenas* decision has paved the way for using animation at trial, providing crystal clear guidance on admissibility that prevents any hesitation on the part of a trial court.

A powerful animation breathes life into a case, visually connecting the dots between expert witness opinions, medical records, and other physical evidence. Significantly, sixty-five percent of people are visual learners – processing information based on what is seen.¹ In 2016, adults in the United States devoted approximately 10 hours and 29 minutes per day consuming media, with 8 hours and 47 minutes devoted to visual consumption (i.e., smartphones, television, videogames, computers, etc.).²

To ensure admissibility, an animation must never be presented as a re-creation and must adhere to the directives in *People v. Duenas*.

People v. Duenas

In 1997, Los Angeles County Sheriff's Deputy, Michael Hoenig, attempted to stop and interview Enrique Parra Duenas, a gang member cycling through the "South Gate" neighborhood. The sheriff's deputies who

patrolled South Gate had recently been instructed by their supervisors to interview cyclists because the suspect in several burglaries had left the scene by bicycle. As Deputy Hoenig attempted to pull him over, Duenas shot into the patrol car and then walked around to the front of the car and shot Deputy Hoenig three more times, killing him.

Animation was used to depict the prosecution's expert's opinion that the defendant fired a series of shots from different locations: including shots while Deputy Hoenig was lying on the ground, suggesting premeditation and deliberation. The expert's opinion of where the shooter was located was partly based on the location of shell casings found at the scene. The defense attacked the animation as speculative, creating an improper air of scientific certainty, and inadmissibly cumulative. The trial court was not persuaded, and Duenas was convicted. The courts of appeal had no consistent policy and punted.

Instead, the Supreme Court was solid: "Whatever uncertainty may exist as to the actual facts in this case, the animation accurately illustrates *the opinions of the prosecution's experts* with regard to how the murder occurred, and that is all it purported to do." (*People v. Duenas* (2012) 55 Cal.4th 1, 22, emphasis in original.)

Thus, the only foundation required for admissibility of an animation is the animation must reflect an expert's opinion, since it is demonstrative evidence to help a jury understand an expert's testimony. (*Id.* at 20.) The Court reasoned: "[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." (*Id.* at 21 [emphasis in original].)

As for defendant's arguments on the cumulative effect of the animation, the Court found the position to "misapprehend the animation's role as demonstrative evidence." (*Id.* at 25.) As such, it is "appropriate for the animation to correspond to the other evidence offered." (*Ibid.*)

Thus, so long as an animation accurately illustrates the *opinions* of expert witnesses, corresponds to other evidence offered, and the jury is instructed as to the animation's demonstrative purpose, admissibility is not an issue.

Picking the right case to animate

Good animations are not cheap and cheap animations are not good. Choosing to animate a case is a decision made based on whether the return on the investment supports the financial and time-intensive undertaking.

Where the mechanism of the injury is complicated, or the underlying liability is strongly contested, an animation may be the only way to bring the case together for a jury. Below are examples of cases where our animations were an integral part in achieving the right result for our clients.

Liability and causation animations

In a horrific bus v. pedestrian case, our client was walking to work in downtown Sacramento when she was hit by an El Dorado Transit Authority bus and dragged 120 feet along 5th Street before the driver came to a stop. The bus driver was making a right turn and failed to yield to her right of way as she lawfully crossed the street in a marked crosswalk after the walk signal indicated it was safe to cross. The on-board CCTV camera showed that the bus driver was focused on cars coming from his left and never looked to the right before initiating his turn.



The animation created for the case utilized the CCTV camera footage from the bus, local security camera footage from surrounding buildings, and police scene photographs. The animation supported the clear conclusion that our client had no comparative fault and the tragic ordeal was solely the result of the driver's negligence. This animation is available for viewing at <https://youtu.be/vml9CsHtCks>.

Another animation was critical in resolving a severe traumatic brain injury case where liability was vigorously contested. This auto v. motorcycle crash occurred when our client, riding his motorcycle within the posted speed limit, was hit by a driver executing a left turn from a median island containing overgrown shrubbery.

The plants in the median were approximately six feet tall and extended 43 feet in length along the median, creating a visual hazard for motorists turning left into the neighborhood. The animation clearly demonstrated how the grossly overgrown bushes completely obstructed the driver's view of our client's approach. It supported our expert's testimony that a left-turning vehicle at that intersection required 310 feet of sight distance based on the posted speed limit, but the actual sight distance at the intersection was only 228 feet. This animation is available for viewing at <https://youtu.be/2kiYAUT4WiA>.

Damage animations

In a premises-liability case, where a tree root had caused a dramatic break and rise in a city sidewalk, our animation concisely demonstrated the biomechanics of our client's severe tibial and fibula fracture. His injury resulted in a below-the-knee amputation, a horrific result from what some might see as a 'simple' trip and fall. Our concern was that a jury may not understand how this fall could generate the forces required to produce such a catastrophic injury.

Reflective of our biomechanics expert's opinion, the animation showed how the location of plaintiff's encounter with the damaged sidewalk in combination with the rotational forces inherent in the mechanics of falling generated sufficient force to cause

his injuries. The animation also reflected medical expert testimony of location of the fractures, the point in the continuum in which the fracture occurred, and the lack of outside factors contributing to the plaintiff's fall. This case settled on the eve of trial. This animation is available for viewing at <https://youtu.be/5KBdpTMzwjo>.

In a police procedure case, our client was involved in a domestic argument and the police were called. While on the second floor of the apartment building, he initially refused to come downstairs, so an officer went upstairs to confront him. After a brief conversation, the officer handcuffed our client's hands behind his back before directing him to walk down the concrete stairs. The pair began their descent, with the officer walking behind our client. Approximately two-thirds of the way down, our client fell head-first down the staircase – landing face-first on the concrete pad at the bottom of the stairs, fracturing his skull and causing permanent brain damage.

The City stipulated to liability but contested the nature and extent of plaintiff's claim of permanent brain damage. We prepared an animation to present the complicated biomechanical and physiological effects of blunt force trauma, taking viewers through the incident blow by blow and explaining the resulting physiological trauma. This animation is available for viewing at <https://youtu.be/4g2SVcehyEU>.

Getting the animation into evidence at trial

It is not necessary to file a motion in limine to use your animation because the California Supreme Court has already ruled on the admissibility. Instead, should the defendant file a motion to exclude your animation, a simple opposition setting out the *Duenas* holding and attaching the opinion will explain the animation is demonstrative of your experts' opinions and only intended as demonstrative evidence. We have never had use of our animations denied by the trial court.

Further, any misgivings about your animation's adherence to the directives in *Duenas*, can be alleviated by reminding the court your intention to use CACI 5020

Demonstrative Evidence, which instructs juries as follows:

During the trial, materials have been shown to you to help explain testimony or other evidence in the case. Some of these materials have been admitted into evidence, and you will be able to review them during your deliberations. Other materials have also been shown to you during the trial, but they have not been admitted into evidence.

You will not be able to review them during your deliberations because they are not themselves evidence or proof of any facts. You may, however, consider the testimony given in connection with those materials.

Using this instruction should put to rest any lingering hesitations regarding defendant's motion. However, the key to the approach is to confidently rely on the *Duenas* decision and keeping your opposition simple.

Getting jury numbers at settlement

Using animations to fully inform defense counsel and the defendant's insurance carrier about your case transforms mediation into an opportunity to achieve jury numbers from settlement.

Several years ago, I was on the eve of trial when I got the call from defense counsel asking me to try mediating the case one last time. At that point in my career, I was a firm believer in holding back at mediation and baring all at trial – to make the defense dance at trial. This was working well for me and I was happy with the resulting verdicts.

But on this occasion, not wanting to waste the weeks of trial preparation I had undertaken, I decided to lay out my whole trial presentation during the mediation. The presentation included a detailed PowerPoint and, of course, a powerful animation. The animation detailed the opinions of my accident reconstructionist, biomechanical engineer, and medical experts. The animation eviscerated any doubts as to liability, comparative fault, or the extent of damages. I was prepared for the arguments regarding the animation's



admissibility and was able to diffuse all suggestion of speculation and prejudice.

To my pleasant surprise, the settlement reached that day was a number I only thought possible from a jury verdict. This experience changed the way I approach mediation/settlement conferences and has resulted in the resolution of many cases I thought would only resolve fairly at trial.

Examples of combined day-in-the-life and animation are available for viewing on YouTube at: <https://youtu.be/pjP0KuuWSEk> and <https://youtu.be/uW5ixQagQtA>

List of vendors that supply high quality animations

Our office employs four full-time animators. However, there are a number of quality animation vendors available to work with you. Here is a list of animation vendors who offer their services in the San Francisco Bay Area whose work we have seen and liked: Cogent Legal: <https://cogentlegal.com>; Hi Impact: <https://highimpact.com>; and 3D Forensic: <http://www.3d-forensic.com/>

Endnotes:

¹ Bradford, William C., Reaching the Visual Learner: Teaching Property Through Art (September 1, 2011). The Law Teacher Vol. 11, 2004.

² The Nielson Company. (2016) The Nielsen Total Audience Report retrieved from <http://www.nielson.com/content/dam/corporate/us/en/reports-downloads/2016-reports/total-audience-report-q1-2016.pdf>

Steven Brady has exclusively represented individuals and their families in civil matters against insurance companies and corporations who put profits before safety and just compensation for more than thirty years. Mr. Brady graduated from Northwestern University with Honors in Philosophy, obtained his law degree from Loyola Law School and was admitted to the California Bar in 1984. He founded the Brady Law Group in 1998. He has tried over 90 cases to verdict and has been a frontrunner in the use of graphics and animations at trial. He speaks regularly to local, state, and national trial lawyer organizations.



Brady

Jessica Dewitt is a Bay Area native. She graduated from Southern Methodist University in 2006, with honors. She received her law degree from Texas A&M University School of Law (formerly TWU School of Law) and was admitted to the Texas Bar in 2012. She began her law practice in insurance defense litigation focusing on medical malpractice. She was admitted to the California Bar in 2016, joining the Brady Law Group in May of 2017. Jessica is the firm's Associate Trial Attorney and she supports Steve Brady directly with his trial docket. She is an integral part of the trial team and brings creativity and passion to her client advocacy.



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