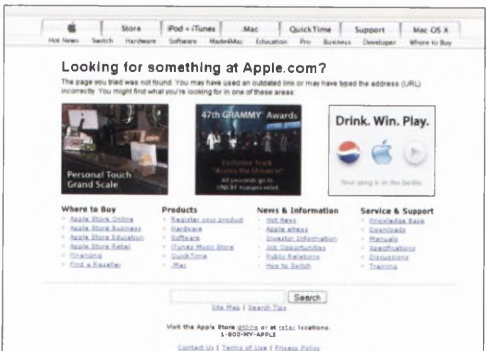


The electronic opening address

By Rob Davis



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Our capacity to receive and assimilate complex material quickly is limited by our primary senses of sight and hearing. This means communication is largely limited to words and pictures.

Historically we have relied, in courts at least, on linguistic material. This bias is due to a number of factors. Lawyers are wordsmiths. We study cases, write opinions, draw pleadings and use language to examine witnesses and argue cases. Unsurprisingly, technology to assist linguistic communication has been around since Johann Gutenberg invented printing in the 1450s, although it was given a major boost by Christopher Sholes' invention of the typewriter in 1868 and, more recently, by Microsoft bringing word-processing to the masses via MS-Word in the 1990's. We are so used to linguistic communication that it blinds us to the alternatives.

Over the last 10 years the technology for conveniently presenting visual material in courts, mediations, and conferences has become reliable, easy to use, relatively cheap and ubiquitous. What has not happened, for Australian lawyers at least, is a rush to embrace the persuasive advantages of this technology. Lawyers seem to have forgotten the old axiom that a picture can be worth a 1,000 words.

Perhaps the most obvious opportunity for using visual material is when opening a case before a judge or a jury. Openings are not just something you have to do so as not to take the opposing counsel by surprise. They are the first stage (and with the exception of the closing address, perhaps the most persuasive phase) of presenting your client's case to those who will decide if you win.

Psychological studies show that people remember best what they see and hear first and last (known as 'primacy' and 'recency' effects). Most people also find it easier to remember complex material conveyed visually than they do if it is conveyed in spoken form. Presenting a clear and concise statement of your argument, albeit in the form of the evidence you intend to produce, creates a lasting impression to the adjudicators of fact. They then have a conceptual appreciation of your case and will look, as the evidence is presented, for material that reinforces the points of your opening. It is a powerful persuasive opportunity that should be fully exploited whenever it presents itself.

Inexperienced lawyers, ever fearful of provoking cantankerous judges or providing grounds for mis-trial (by, for example, opening matters that go beyond the evidence) often reduce openings to a dull dirge of facts that bore more than they assist. As a result, many openings do little to advance the case or endear an advocate to the judge. It is important to remember that the 'primacy effect' is a double-edged sword. A hesitant or confusing opening will have negative consequences, portraying counsel as incompetent, ill-prepared or evasive. Negative perceptions, once formed, can prove very difficult to displace.

The maxim that you 'open the evidence not the argument' does not mean that you should not open the evidence in a way that illustrates why you should win. That said, if you intend to use visual material in an opening address before a jury then, depending on the material, it is wise to raise it first with both the opposing counsel and the judge. If there is any

risk that the material you intend to use might not get into evidence, then you are best not to risk it.¹

Visually presented evidence can take a number of forms. Often it consists of no more than an official plan or map, a diagram from a textbook or a photo of a product or a scene that will readily be admitted into evidence as an explanatory aid. Sometimes, however, admissibility may depend on more complex evidence being admitted first. This applies to many hand drawn diagrams reconstructed from witness recollections and computer reconstructions that depend on earlier factual evidence (often from multiple witnesses) for admissibility. The more complex the process of admission into evidence then the less likely you will get away with using the material in the opening.

Some evidence lends itself to, even screams out for, visual aids. This is something you should bear in mind throughout the pre-trial preparation phase. Visual aids often take time to prepare and cannot be assembled on the morning of trial! Examine the evidence to be presented and ask whether critically significant evidence, given the witnesses available, can more clearly and favourably be presented by maps, diagrams, photos, etc. Remember, too, that the evidence must be capable of tender as an exhibit. There is no point relying on visual material on your laptop if you have forgotten to prepare and bring the hard copies on which it was based!

Visual evidence is often useful in cases involving vehicle and work accidents, defective product claims and complex cases such as medical negligence. Aside from the communicative advantages of visual material, it also breaks the monotony of oral testimony. It is amazing how judges and jury members wake up when a visual aid appears. At the end of a lengthy or complex trial monotony sets in and it is the rare occasions of interest that will prove most enduring in their memory. When used correctly, this can be a powerful tool.

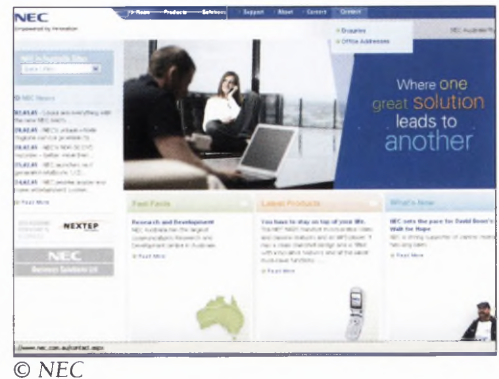
Of course, there is no reason why visually presented material be confined to diagrams, maps, photos, etc. Presentation software enables lawyers to summarise the main points of an

opening, much like presenters do at seminars when building a point-form summary or outline on screen to assist their presentations. This type of format enables the same points to be communicated both aurally and visually, creating a repetition effect that aids retention in the memory of the recipient. Just as a good presenters modulate their voice to underscore important content, visual summaries can employ bold type, underlining or even colour to achieve a similar effect.

There are a number of different types of presentation software available. Microsoft PowerPoint² has such market penetration that it appears ubiquitous. It is excellent software that is easy to master with a little practice. Some other alternatives exist, depending on the operating system being used. One that is very good is Apple's Keynote,³ which unfortunately only runs on the Mac OSX platform. Both PowerPoint and Keynote contain a large number of templates that make it easy for artistically challenged individuals to produce appealing presentations. Each permits a wide range of media to be incorporated into a presentation, from videos, photos, graphs, diagrams, sound, text, etc.

Most courts have access to data projectors and screens required for a visual presentation. Naturally, it is important to phone in advance and book the equipment to ensure that it will be available. It is critical that you arrive early enough to ensure that the equipment is connected and tested. It can be very off-putting to find that the equipment does not work and have to revert to an oral opening instead.

If the court does not have a data projector and screen available it is possible to hire them for the occasion. Previously this was the only practical alternative for most, as ownership was out of the question due to the prohibitive cost involved. Fortunately the price on portable data projectors has fallen over the last two years and some excellent models are now available in the \$2,000 - \$3,000 range and these will also allow you to project movie DVDs onto a wall when you are not using them in court! Not all data projectors are equal, however, so it



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pays to do your homework before buying.⁴ Some employ LCD projection while some of the newer versions use mirror projection technology that allows a brighter and clearer projection. Some data projectors contain features to adjust projections to enable viewing on coloured walls. ■

Notes: **1** For a good discussion on the role of the opening address see Glissan & Tilmouth, *Advocacy in Practice*, 3rd Edn., Butterworths, Sydney, 1998. **2** See: www.office.microsoft.com/en-us/FX010857971033.aspx. **3** See: www.apple.com/iwork/keynote. **4** See, for example: www.viewsonic.com.au; www.sony.com.au; www.nec.com.au; www.toshiba.com.au; www.dell.com.au; to mention only some manufacturers of quality lower priced data projectors.

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