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April 2011 Jury Tip: “Tailor your themes to your jury”

There is no perfect, one-size-fits-all opening statement. There is no such thing as an opening statement that makes sense, and appeals to, every juror. An opening statement that persuades some jurors will dissuade other jurors who have their own completely different points of view.

Malcolm Gladwell did a terrific job of illustrating this point while writing, interestingly enough, an article on consumer preferences called “The Ketchup Conundrum” in the *New Yorker* years ago. Gladwell, who does as good a job as anyone examining how humans make decisions and the study of why humans do what they do, told the story of consumer preference testing in the pasta sauce market and found that there was no such thing as the “perfect” pasta sauce. He noted that, “in those years, people in the food industry carried around in their heads the notion of a platonic dish—the version of a dish that looked and tasted absolutely right.” Yet when the product tester analyzed the taste testing, “he saw that everyone had a slightly different definition of what a perfect spaghetti sauce tasted like. If you sifted carefully through the data, though, you could find patterns, and Moskowitz learned that most people's preferences fell into one of three broad groups: plain, spicy, and extra-chunky.”

Jurors are no different than consumers. They don't share the same preferences and values, and they don't all see the world the same way. There is no such thing as a perfect opening statement, because the effectiveness of an opening statement depends entirely on the effectiveness of its themes, the effectiveness of its themes depends entirely on how receptive the jurors are to those themes, and the jurors themselves aren't uniformly receptive to the same themes.

There is no such thing as “perfect” when perfection is judged by individual opinions, so there is no such thing as the perfect opening statement. More specifically, there is no such thing as a universally effective opening statement. The concept is hardly revolutionary and probably didn't shock you at all. You probably agree, yet I'm certain that many of you fail to incorporate this principle into your approach when you prepare an opening statement for trial. Give some thought to what the makeup of your audience could be when you write your opening statements. Ask yourself, do you write opening statements that seem persuasive to you? If so, you're writing openings for jurors who think exactly the way that you think; unfortunately, few jurors think like lawyers. Do you write opening statements that seem persuasive to the lay people around you? If so, your openings will be skewed toward the unique point of view of your family and friends.

Most importantly, do you write a single draft or outline of an opening statement before jury selection? If so, you're making a faulty assumption—that all jurors have the same, universal point of view. I'm not suggesting that you wait until jury selection is finished to write your opening statement—that would be impossible. But you should write a flexible opening statement and be prepared to tailor it to the unique point of view of your jury based on what you've learned about them in voir dire. An even better approach, and one that I often create for my clients, is to prepare two opening statements, each designed to appeal to a different type of jury. This isn't impossible, because juries of 12 don't contain 12 clashing points of view. They usually fall into categories.

Continuing Gladwell's story, his researcher examined the taste testing data and demonstrated that "if I make one group happier, I piss off another group. We did this for coffee with General Foods, and we found that if you create only one product the best you can get across all the segments is a 60—if you're lucky. That's if you were to treat everybody as one big happy family. But if I do the sensory segmentation, I can get 70, 71, 72." Like pasta sauce or coffee consumers, jurors do share preferences with one another in smaller groups. So while there isn't a perfect universal opening statement, you can deliver the perfect opening statement for your unique jury.

You can't possibly tailor your opening statement without knowing something about your jurors' points of view first, so you need to spend some time in jury selection treating voir dire like a focus group. If you practice in a venue in which the courts don't allow you to ask any voir dire questions, I feel your pain. Your options are severely limited, but you can try to make some assumptions based on the little you do learn—the jurors' occupations, for example, will help you to make assumptions about what they know, what they expect, and how they view the world. If you haven't read my old jury tip on treating voir dire like a focus group, I suggest you do (it was in December 2009).

Think about your case and how different jurors with different values, different experiences, and different points of view might view your case differently than one another. Identify the one difference of opinion or experience that would make two jurors view your case in opposite ways. In a criminal case or a civil lawsuit heavily dependent on circumstantial evidence, you might want to distinguish between jurors who are naturally "suspicious" and those who are naturally "careful" and "skeptical." In business cases, you'll often want to determine whether your jury is dominated by "cynical" jurors or "trusting" jurors—that is, jurors who are cynical about human nature and have jaded views of the business world versus jurors who are naturally optimistic and trusting toward even business competition. In cases where there is a conflict between the spirit of the law and the letter of the law—in other words, where the defendant is accused of doing something technically wrong but practically fair and reasonable, or vice versa—your opening statement should completely depend on whether your jury is dominated by strict rule-followers or practical, "fairness-focused" jurors. Or your choice might be very specific to your case: in some cases this year, I have prepared separate opening statements depending on whether the jurors were optimistic or pessimistic about the future of the economy, or on whether the jurors believed that it made sense for an employee to voluntarily take a lesser-paying job for some non-monetary reason. During

these jury selections, we found jurors on either side and adjusted our opening statements according to who was left on the jury, and how the most influential, vocal jurors felt.

Long before jury selection, prepare two drafts or two outlines of an opening statement—one for each flavor of jury you might end up with. Prepare separate trial themes for each, remembering that there is also no such thing as the perfect, universal trial theme. Think about what you might have to emphasize to one type of jury that the other type wouldn't care about. If your client did something that seems unfair or offensive, you might have to apologize and defend yourself in front of a sensitive, "trusting" jury, but not to a cynical jury that doesn't think there's anything wrong with self-interest or cutthroat business competition. There will undoubtedly be plenty of overlap between your two opening statements—much of the story and many of your arguments and trial themes should be told to both juries.

As I've stressed many times in the past, it's essential that your case supports what your jurors already believe, so you'll need to find a way to convince your jurors—even the hostile or skeptical ones—that your case fits their values and beliefs. When your jury isn't perfect, delivering your ideal opening statement as originally written is a huge mistake. You will never persuade a jury full of deeply religious, strictly-ethical Sunday School teachers to acquit a corporate defendant by arguing that "there is nothing illegal" with the unethical, outrageous things they may have done. And you'll never persuade a panel of investment bankers and hedge fund traders to award damages against a corporate defendant by appealing to their sense of outrage and asking them to "teach cutthroat companies a lesson."

By the time you step to the podium to deliver your opening statement, your jurors will have serious concerns that you need to address and overcome. They'll also have their own reasons to be receptive to your case, but those concerns and hot buttons are totally different depending on what kind of audience you're addressing. You have to build credibility from the start of your opening statement, and the only way to do that is to incorporate what your jurors already believe into your trial themes and your message. So the next time you prepare for a jury trial, make sure that you anticipate more than one possible point of view and prepare different messages depending on your jury.

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