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July 2009 Jury Tip: “Keep your opening persuasive”

Talking too much about the details and minutiae of your case in depth is the biggest mistake you can make in an opening statement. Remember, an opening statement is your best and only chance to convince your jurors that what you’re saying is true, is likely, is fair, and makes sense. If you get too detailed and involved, your jurors will be too busy expending their mental energy learning and struggling to understand what you’re saying to focus on building trust in you and your case.

Never turn your opening statement into a table of contents, rattling off evidence without explaining to the jurors what the evidence means. I see this mistake made all too often. This is like emptying the box of a jigsaw puzzle in front of someone and expecting them to see the picture. Your opening should be structured around your trial themes, not around your evidence. Remember, the evidence itself is not a theme. Trial themes are persuasive messages, loaded with unspoken values, that give jurors REASONS to trust in your case. Trial themes are your way of telling jurors the conclusions they should draw from the evidence—that it’s wrong for companies to put profits before safety, that it’s fraud when a seller makes it difficult or impossible for a buyer to discover defects, or that it’s not fraud when a buyer fails to ask questions and do their own investigation.

Never turn your opening statement into a complicated, educational lecture about the complex issue your case involves. I see this mistake made all too often. I understand why it seems important to educate your jurors early on about the subjects they’ll be hearing about throughout trial, but you must understand that there isn’t enough time in a six-week trial to make your jurors capable of making educated, informed decisions about how a physician should treat a myocardial infarction or corporate obligations under Sarbanes-Oxley. Not only will you confuse and bore the jury, you’ll have wasted your only opportunity to persuade them. Instead of educating your jurors, promise to explain the issues to them later and immediately explain what the evidence will mean. “You’ll hear some medical experts explain to you what an arterial infusion is, and the right and wrong times for a doctor to perform one on a patient, but we’ll show you that it was dangerous for Dr. Jones to perform an arterial infusion on Ms. Lee without reading the results of all her medical tests first. Now you don’t have to be an expert to know that it’s foolish to try fixing a problem before you’re sure of what the real problem is, but our experts will tell you that...” And yes, I know there’s no such thing as an arterial infusion.

Remember that cases are won and lost over how well your arguments agree with your jurors' values. Your jurors don't truly make decisions based on objective views of the evidence, so you should only use the details of your case as examples to show your jury the sense you're making or to discredit the opposing side's case. The details and minutiae of your case—perhaps the workings of a complex machine involved in a patent dispute or product defect allegation or an involved background story of an employee's work history or the unique workings of a company's employee evaluation program or progressive discipline procedures—distract jurors from your persuasive trial themes. When you get into lengthy explanations of the details of your case, you are getting stuck in a story within a story. At the end of your opening, your jurors might understand how something works, but they'll have less understanding of what you're arguing, what your messages are, and almost no understanding of why they should believe in your case.

It's often said that the most effective, interesting opening statement is a story, and there's some truth to that school of thought. If your case lends itself to an interesting narrative, storytelling is the most effective way to make your opening interesting to your jurors. Not every case lends itself to a storytelling narrative, though, and every opening statement should be about more than just a story. If, like many cases, yours involves a series of events rather than a continuous action, choose a central event that illustrates your main message and start your story there so that your jurors focus on it. And always conclude your storytelling with a moral of the story and the messages you need your jurors to focus on.

There is a time and a place for downloading the details to your jurors and focusing on the minutiae. Use your experts and your knowledgeable witnesses to explain complex concepts in a clear way to your jurors. Whether or not the jurors truly understand a trial's central concepts may not influence their decision-making, but whether or not the jurors BELIEVE they understand the concepts does matter to them. Jurors rarely come out of trials truly understanding the concepts—their deliberations are always marred by misconceptions, even about evidence you presented clearly—but jurors feel paralyzed and unable to reach verdicts when they don't BELIEVE they understand the concepts, so it's important to make the effort to educate them.

The next time you prepare an opening statement for a jury, focus on credibility, not on content. Assume that your jurors won't remember the details and minutiae of your case, because they probably won't. Make sure you're not overloading your jurors with facts, details, and explanations. Instead, make sure that you're distilling the essence of your evidence and the details of your case into clear, simple messages that agree with your jurors' values and beliefs.

An ideal opening statement should be 20 minutes long, not 3 hours. Jurors start losing their attention around 30 minutes, and by 45 minutes they'll start tuning you out or forgetting the important messages you discussed in the first half of the opening. I've seen my share of two-hour opening statements, talked to mock jurors afterward, and can assure you that they're not necessary, or even helpful. There's only so much room in your jurors' memory banks and only so much they can digest and focus on at once, so make sure your messages aren't competing with and cannibalizing each other. Just because your case is especially complex doesn't mean you should give a longer opening statement; in fact, it is even MORE important to keep your opening short, clear, and simple when your case is unusually complex. Jurors are persuaded by clarity and simplicity. They believe that even the most complex questions (and complex trials) have simple, common sense answers. If your opening statement is overly complex and the reasons you give your jurors for believing in your case are convoluted, confusing, and overwrought, your jurors will be far less likely to believe that your case rings true, even if they understand what you're arguing.

One of my favorite attorneys, Irwin Gilbert of Palm Beach Gardens in Florida, once delivered the clearest and most persuasive opening statements I've ever heard on behalf of a plaintiff in a construction defect case. I'll transcribe it here for your benefit: "The roof leaks." Irwin won the trial. It takes courage to make your opening clear, simple, and concise, but don't feel the need to tell your jurors everything and anything in opening statement. Restraint and simplicity will do wonders for your case.

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