

May 2010 Jury Tip: “Recipe for an ideal opening statement”

As important as the make-up of your jury is—and even though voir dire is your first chance to build credibility, to tell your story between the lines, and to begin persuading your jurors—your opening statement is your best (and sometimes last) opportunity to truly persuade your jury. Because every case is so unique, there isn’t any one-size-fits-all solution I could give to help you create the perfect persuasive opening for any given case. What I will do is to give you a broad outline of the essential elements of an ideal, persuasive opening statement; the details I’ll leave to you.

Your opening statement should always include some storytelling, from a carefully chosen point-of-view. Stories are the most interesting ways to introduce your jurors to what happened in your case and to the options, choices, failures, and actions of the parties. Telling a story is the best way to help jurors organize events, remember what they’ve heard, judge decisions made by the parties, and figure out why the parties did what they did. By carefully choosing from whose point-of-view you tell the story, you encourage jurors to step into the parties’ shoes and help them to understand why your client did the right things or what the opposing party did wrong.

Too often I hear opening statements that sound like a table of contents. When you explain what happened without telling a story, you’re essentially reading your jurors a list of causes of action or affirmative defenses, and they’re left disoriented and unable to judge anything. Any opening statement that does nothing more than outline the evidence and force jurors to draw their own conclusions will confuse jurors, not persuade them. Your evidence doesn’t speak for itself, and only you know how your evidence fits what you will ask your jurors to do with it. The extra explanations that explain what your evidence means, how your jurors should judge it, what they should do with the evidence (their verdict), and why they should believe that verdict is fair are trial themes. Trial themes are simply the messages that you want the jurors to get from your presentation of evidence and the values that your case relies on to convince jurors that your verdict is the right thing to do.

An opening statement without trial themes and values is simply not persuasive. Your opening statement should never be a list of your evidence, even with a trial theme at the end to tie everything together. Instead, organize and present your evidence into topics according to your trial themes. The clearest part and central message of your opening statement should be your trial themes—if it’s only a detailed summary of your evidence, the details and minutiae will confuse and bore your jurors. Instead of making your opening about the details, subordinate the details to show the jurors that you have plenty of evidence to support your trial themes, instead of the other way around. For example, you could easily communicate your values and trial themes in a fraud case by saying “it’s wrong to blame someone else for tricking you when it was your job to find out information in the first place. The evidence in this case will show that the plaintiffs were

supposed to research everything themselves, but instead they CHOSE to assume that the sellers had told them everything, didn't do ANY research on their own or even ask a single question, and now they're blaming us. For example..."

I've often heard lawyers recite a long summary of the experts who'll testify, with out-of-context summaries of what they'll say or descriptions of their credentials. Talking about the experts in your opening statement does nothing to persuade the jurors; it's like telling them that smarter people have already made up their minds for them. Just when the jurors are starting to develop their own feelings, suspicions, and skepticisms about the case and begin wanting to judge the case for themselves, you're talking about experts instead of what happened. Having interviewed thousands of jurors after actual and mock trials, I can tell you that one of the jurors' most common complaints is that "we didn't need an expert to tell us that, we could figure it out ourselves." Talking about your experts in opening is worthless, but I've found it persuasive to tell jurors things like "you don't need an expert to know that customers are more willing to buy products with recognizable trademarks like the Nike swoosh or the Coach logo, but we'll have an expert tell you that the defendant made more money by copying our trademark."

Any persuasive opening statement should explain to the jurors, in clear terms, the difference between a frivolous case and a meritorious one (if you represent the plaintiff) or the difference between an unreasonable defense and a fair one. Hopefully you've learned about your jurors concerns about your case and their definitions of right and wrong during voir dire. In your opening, show that you've listened and explain to them how your case is completely different from the frivolous cases or irresponsible defenses they've complained about in voir dire.

"The evidence in this case will show that our ex-salespeople did more than just take their experience and know-how to a competing company. If that's all they took, we wouldn't have been thrilled about it, but it would have been perfectly legal. But instead, the defendants took actual secrets of ours with them..."

Let's say your jurors complained in voir dire that people who trust verbal business promises without getting anything in writing are foolish, naïve, and should only blame themselves if the promise is broken. How do you think your jurors will react during your opening statement if you insist that oral contracts are just as valid as written ones and that the defendant should be blamed for breaking a verbal promise? If you've been able to treat voir dire like a focus group, use what you've learned and tailor your opening statement to fit your jurors' beliefs. In your opening, you'd be better off admitting that your client was foolish and naïve for trusting a promise and getting burned, but that enforcing broken promises is the only way to stop trusting, naïve people from having to get burned and learn the hard way, and to stop irresponsible businesspeople from taking advantage of trusting people.

Because every juror judges the litigants based on what they would have done, every opening statement should discuss not only what your opposing litigant did, but more importantly what they COULD have and SHOULD have done, but didn't. Even word

choice matters—jurors are much more critical when they are told that a plaintiff or defendant “chose” to make the bad decisions that they did.

As the plaintiff or prosecution, you should ALWAYS take the time to address the defenses and “excuses” the other side is likely to present. The major advantage to presenting your case and your opening statement first is NOT the chance to completely win over your jurors before the other side has a chance to speak. Instead, your main advantage to going first is the chance to refute and rebut their case before they’ve even presented it. A huge part of persuading jurors is to get them to think about the case in favorable ways, to focus on your strong issues, and to ignore the other side’s key issues. The plaintiff (or prosecution) has the unique chance to explain to the jurors what the case is REALLY about, and why the defense’s explanations are irrelevant excuses.

When you have the chance to go first, NEVER miss the opportunity to fully address the defense’s case before they do. If the defense has some powerful things to say—perhaps your plaintiff in a wrongful death case already had a terminal illness, your plaintiff in an intellectual property case took some inspiration and copied some ideas from someone ELSE’S idea, or your plaintiff in an employment trial failed a drug test—make sure you mention it first. Not only does it take the sting out of the jury and prevent the defense from dropping a bombshell, your willingness to talk about the weakest parts of your case leaves the impression that you aren’t worried and concerned about it. That makes your jury even more receptive to arguments that defuse the issue and make it less relevant. Some of the most persuasive defense opening statements I’ve seen have taken full advantage of a plaintiff who failed to mention the elephant in the room during their opening. Letting the defense give jurors your bad news first can be disastrous.

As a plaintiff or prosecutor, the most often overlooked but most important part of your opening statement is the fundamental way to build trust and credibility in your case: by finding a way to tell your jurors that you understand the concerns and worries they discussed in voir dire, that you understand their concerns are valid and wouldn’t be suing (or pressing charges) if you couldn’t address those concerns, and that your case is DIFFERENT. Of course, you’re not allowed to communicate the message so bluntly without objection, but every case has a way, and you’ll have to be creative in getting that message across. For example, in a medical malpractice case, you may want to say “We all know that every surgery is risky and that patients have to accept the EXPECTED risks of surgery, so we aren’t blaming the doctor just because Mr. Johnson’s surgery didn’t go well. But the evidence will show that this is NOT a case about a surgeon trying his best and making an honest mistake; instead...”

For those of you on the defense side, don’t worry that I’m leaving you out. There are also advantages to going second, reacting to what the plaintiff has said, and having the last word. I talked about the importance of plaintiffs addressing your most damaging issues before you have the chance, but often the plaintiffs hope to avoid the issue, which presents you with a valuable opportunity. One of the most effective techniques you can use in your opening is to take some time to highlight “what the plaintiff DIDN’T tell you” for your jurors. Because of the way that jurors scrutinize credibility, the content of

what a plaintiff failed to mention is actually less persuasive than the mere fact that the plaintiff “tried to hide it” from them, and you need to seize on every opportunity to convince your jurors that the plaintiff isn’t telling them the whole story, doesn’t want the jurors to know certain things, and is trying to hide the truth. I may be laying it on thick here, but jurors use these phrases in deliberations, and I can’t emphasize enough just how suspicious jurors become when they find that the plaintiff didn’t mention something. It’s no different from spoliated evidence—when someone gets rid of evidence, the jurors will always suspect guilt and assume that the evidence (even if harmless) must be a smoking gun, and will imagine it to be far worse than anything it could have possibly been. To jurors, the inference of guilt is much more persuasive than admissions of guilt.

Equally devastating to jurors is when they notice that the defense didn’t even address an accusation the plaintiff made in their opening—and believe me, the jurors WILL notice. Even if you know the plaintiff has made an insinuation that has no evidence to back it up, is misleading, or isn’t relevant at all, remember that your jurors DON’T know that. They are incredibly observant about noticing when the defense ignores an accusation or seems to be side-stepping an issue. Take the time to address each and every accusation the plaintiff raises in your opening statement.

Admittedly, it may be difficult to fit all of these ingredients into a persuasive yet brief opening statement. I’ve said before that an ideal opening statement is perhaps 20-30 minutes, and no more than 45 minutes long. However, when you’re crafting your next opening statement, keep in mind that a truly persuasive opening doesn’t NEED much detail at all—that’s what trial is for. As long as your jurors trust you and understand your message, you’ve accomplished all you need to, so make sure to include all the ingredients here. Too much detail is wasted and bogs down your efforts to get your message across, so I encourage you to be creative, be brief, and be brave enough to choose simplicity instead of detail-overload.

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