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September 2012 Jury Tip: "Telling a Persuasive Story"

Having observed literally hundreds of live opening statements in actual court (and easily more than a thousand if you include mock trials), I have seen all kinds of ways of delivering an opening statement. Undoubtedly you've been told that an opening statement is supposed to be a "roadmap," whatever that means. That you're supposed to give your jurors an outline of the evidence that will be presented during the trial, to never make persuasive arguments, and to stick to statements about what "the evidence will show."

Hopefully you don't interpret those guidelines too strictly. Instead, I hope you do your best to push the envelope and persuade your jurors as much as possible within the guidelines. I'm not recommending that you overtly argue in your opening statement; in fact, I've written jury tips on why you shouldn't argue too early in your opening. What I am recommending is that you don't structure your opening statement around the testimony and evidence. Don't take your jurors through a dry summary of the experts or the testimony; instead, tell the jurors an interesting story of what happened. Carefully construct that story so that it is told persuasively, emphasizing your trial themes without arguing them directly. Carefully choose what to focus on and highlight, and carefully choose how you tell that story.

I've often seen lawyers deliver an opening statement without telling a story, and I think it's a huge mistake. Jurors struggle to make judgments and to connect the dots while they're still confused and trying to figure out what happened. And until the jurors hear the entire story of what happened, they will be confused. Your strongest points will be totally lost on your jurors if your jurors don't understand the context. Telling a story isn't just important because stories are interesting and grab your jurors' attention. Telling a story is essential to giving your jurors the context they need to understand why your important points are actually important.

On the other hand, I often see lawyers tell a linear story from start to finish, and I think there's a better, more persuasive way. The point of telling a story is not simply to tell your jurors what happened in an interesting way; the goal of storytelling in an opening statement is to deliver a persuasive message. And for the most part, your message is that the opposing side did the wrong thing, or that your litigant did the right thing. It's certainly possible to make that point by telling a story start-to-finish, but you can emphasize that point much more persuasively by building your story around something I'll call the "central turning point."

The "central turning point" is the key moment when the defendant or plaintiff could have chosen to do the right or wrong thing, but didn't. Or perhaps the key moment when your defendant did do the right thing, given the circumstances and the situation. The central turning point is when the driver saw the light turn yellow, but decided to speed through the intersection. When the doctor noticed a troubling symptom or test result, but decided not to operate immediately. When the company considered alternative product designs, but decided to choose a design similar to a competing, patented product.

There are no "right" or "wrong" ways to tell an opening statement, and there is more than one way to tell a persuasive story. The last thing I would ever recommend would be to create a formulaic template for every opening statement. Every case is unique, and the structure and style of your opening statement should always be tailored to your unique facts and themes and strengths. But no matter how you tell your story, you need to make sure to focus your jurors' attention on the issues that matter most. Take the time to figure out what you want your jurors to focus on, and build your story around that issue or fact or decision. Usually, that focus should be on the central turning point where the other side had all the information and opportunity to do the right thing, but instead chose to do the wrong thing.

One way of telling a persuasive story is obviously to start from the beginning, but be sure to freeze your story at the central turning point. That means that once you've told the jurors about the events leading up to the central turning point, once you've talked about all the details that show that the other litigant had all the information and opportunity to make the responsible, ethical decision, you need to stop the progression of the story and take some time to be reflective. I'm not suggesting you overtly argue, and you don't necessarily have to tell the jurors that the other side should have done "the right thing." Just take a few minutes to force the jurors to really focus on and scrutinize what the other side knew, what they could have done, and what they should have done. Emphasize the importance of that moment and the litigant's decision. As the story perches on the important decision, remind the jurors about anything and everything that you think is relevant to that decision. Remind them about what a company's policies were, if it turns out the company ended up ignoring or violating that policy. Remind them about the plaintiff or defendant's years of experience or training or expertise, if it turns out they made a decision contrary to their expertise. Remind them what the doctor already knew about the patient's history or symptoms, if it turns out the doctor made a seemingly uninformed decision. Remind them of all the access a company had to a competitor's confidential information, if it turns out the company ended up "coincidentally" infringing or making use of a patent or trade secret. Take your time while the story is frozen at the central turning point, and don't resume telling the story until you've emphasized what the other litigant knew, what they could have done, communicated your trial themes, and made it obvious (without arguing directly) what the responsible, right choice would have been and what the litigant should have done.

By spending so much time and focus reflecting on the central turning point, you are simultaneously building suspense, magnifying the importance of this decision in the jurors' big picture of the case, and most importantly amplifying your jurors' sense of hindsight bias. You're putting hindsight bias to work for you, by allowing your jurors to be hyper-critical of a decision that the other side may not have believed was that important at the time. But in the context of what happened in the case, your jurors will believe that it's awfully important if you focus on it. If you feed into your jurors' natural instinct for hindsight bias, their immediate reaction when you first tell them what the other side ended up doing: "they should have known better."

Once you've given your jurors a chance to scrutinize the decision, weaved in your trial themes, and established what the litigant should have done, the climax of your story is resuming the story and telling your jurors what the litigant chose to do instead. Once you've made this point, the rest of the story and the harm done to your client will seem like a predictable tragedy to the jury.

But another equally persuasive story can be told by starting the story in the middle, starting with the central turning point. First tell your jurors about the incredibly important decision the other litigant had to make, and go backward adding detail after detail that slowly shows your jurors how obvious the right decision should have been. In a recent car crash trial, the lawyer I was working with started his story at the exact moment that the defendant was in a taxi and had to decide whether to drive or take the cab home. How did he get in that taxi? The story then went backward, adding damning details one at a time: the defendant was at a casino. He was miles from home. He had been placed in the taxi by casino security because he was visibly intoxicated. He had been drinking all day, for 9 hours. He hadn't eaten a single thing. Later that day, he would blow a blood alcohol level of 0.3%.

You can guess what ended up happening, but by now you probably have a strong sense of what the defendant should have done, and you will view what ended up happening to the plaintiff as predictable, preventable, and irresponsible. And that's the point of focusing on the moment where the other side had the opportunity to do the right thing, but ended up doing the wrong thing.

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