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September 2011 Jury Tip: "The danger of attacking too soon"

Most trial lawyers are passionate about their cases and their clients, and that can be a wonderful thing. By the time you take a case to trial, you've probably spent months or years getting to know the facts, your client, and the opposing litigant better than any juror could ever know them. You know how honest your client is, how right your case is, and how dishonest and wrong and unethical and sleazy and manipulative the other side is. The problem is, you've already drawn a lot of conclusions, and you want to share them with your jurors. Immediately. Before your jurors have any reason to draw those same conclusions or to trust you at all.

Many, but not all, lawyers believe in trying cases fiercely, loudly, and emotionally. Giving a passionate closing argument can be effective, but it's almost always counter-productive in an opening statement. Your jurors have no reason to believe you yet. And no matter how much you're itching to tell your jurors that the plaintiff or defendant is lazy or unethical or irresponsible, you cannot attack the other side too soon. It will backfire. Not only will your jurors not believe you—because they have no reason to trust you yet—but they'll resent you and become distrustful of you throughout the rest of the trial. Even though you know that the subsequent evidence will clearly show the other side to be reprehensible, you cannot force-feed the jurors and tell them what to think. They hate it. They'll view you as manipulative and pushy. To the jury, attacking the other side before you've given your jurors your reasons sounds like you're jumping to conclusions. They'll view you as unreasonable, even though you know the case backwards and forwards.

Remember some of the advice I've written about building credibility. "The key to winning over jurors lies in finding ways to gain their trust and build credibility… You will only win if you can convince your stubborn jurors to listen to you… If your jurors already distrust you or your case, their skepticism and distrust will completely blind them to even your strongest evidence… Your stubborn, cynical jurors start trial expecting you to be stubborn and unreasonable... They expect to hear excuses, exaggerations, and self-serving half-truths… By the time you start your opening statement, most jurors are actively searching for reasons to distrust and dismiss you and your case."

From my observation of countless trials, lawyers are almost always guilty of attacking too soon in their opening statement, whether they realize it or not. You can be guilty of attacking too soon without delivering a loud, combative opening statement. Any judgment slipped into your opening statement, no matter how well-meaning—"the evidence will show that the defendants lied about…"—alienates the jury. There are ways to subtly persuade your jurors and guide them to view your case your way, but criticizing the opposing side too soon and summarizing your case before you've told your story ("this is a case about…") isn't effective.

Instead of telling your jurors what to think, you have to show them first. Jurors want to think for themselves. Tell a clear story without editorializing or summarizing. Your story should still be told persuasively, but in a subtle way—free of opinion, but full of persuasive techniques designed to encourage your jurors to view the case through a carefully chosen point-of-view, to focus them on the issues you want them focused on, and to create cause-and-effect inferences through the way you tell the story. There are plenty of transparent persuasive devices that don't require you to tell your jurors what or how to think.

One of the most invisibly subtle but effective persuasive techniques is to establish a "central premise" that shapes the way your jurors view the litigants and interpret the evidence. The central premise is too important and nuanced for me to explain in a paragraph, so it will be the topic of next month's jury tip.

Carefully choosing the order in which you tell the story is a subtly persuasive technique. If you want to minimize hindsight bias and prevent your jurors from criticizing your client for "mistakes" they may be unfairly accused of, tell the story from their perspective from beginning to end, keeping the jurors in the dark about important details your client didn't know at the time that might have helped them avoid harm. If you want to encourage jurors to criticize the opposing client, infuse plenty of foreshadowing into your storytelling. Tell the story of the harm first, or hint at it, before you talk about what happened earlier. Focus on the important red flags that the opposing litigant knew about and ignored. If you want to tell a story of dishonesty and fraud, tell your client's story first, then tell the story about what the opposing litigant knew about but was hiding from your client. You don't have to tell your story in straightforward, linear way to tell an honest, persuasive story.

It may be easy and tempting to tell your jurors what caused what—"our expert will tell you that this car crash definitely led to Mr. Jones' disability"—but it's much more effective to tell your story in a way that subtly guides your jurors to making causal connections and inferences. Instead of telling your jurors "the defendant irresponsibly broke company policy by firing my client," tell the story that "without reviewing company policy and talking to HR first, the defendant fired the plaintiff just an hour later."

Attacking too soon and telling your jurors what to think is equally disastrous for both sides, plaintiff and defense. Lawyers on the plaintiff side get the advantage of telling their story first, so don't blow your advantage by immediately ripping the defendants and making forceful allegations the jurors don't have reasons to believe yet. Keep in mind that many jurors are skeptical and distrustful of lawsuits and plaintiffs, so making inflammatory accusations and telling your jurors what to think too early only feeds into your jurors' worst stereotypes of manipulative, unreasonable plaintiffs.

Giving a reactionary opening statement as a defense lawyer is just as bad, and sometimes worse. Keep in mind that by the time you give your opening, the jurors will have only heard from the plaintiff's lawyer. The jurors will have little reason to doubt the accusations they've just heard, and most of the time your jurors will have serious concerns and suspicions. Many times, your jurors will already be upset and outraged, even if the plaintiff's underlying case is much weaker than their opening made it sound. And if the plaintiff's lawyer raised even a single concern in the minds of your jurors, giving a dismissive, indignant opening statement will destroy your credibility. Unfortunately, I've seen this many times—instead of politely telling the jurors that the accusations they've just heard are serious and would be upsetting if true, many defense lawyers take a dismissive tone and resort to essentially calling the plaintiffs liars. Perhaps they are, but you need to communicate to your jury that you take the accusations seriously (no matter how weak the accusations) and give your jurors their own reasons to feel dismissive and indignant.

You absolutely have to give your jurors good reasons to dislike and distrust the other side first. You have to let them draw their own conclusions before you can go into attack mode. Because once your jurors have some context and understand why the other side is so despicable, they'll be receptive to your attacks and your criticisms. Attacking and criticizing the other side is perfectly fine at the END of your opening statement, once your jurors have reached those conclusions themselves. Until you've calmly and politely told your story, given your jurors a chance to think for themselves, and won your audience over, don't try to force your jurors to jump to conclusions by sharing your feelings about the case. There are no shortcuts with jurors.

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