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Opening up

Creating and delivering compelling opening statements



By Miles B. Cooper

The lawyer started out, "There's a basic rule…" The jurors followed the lawyer as the case's narrative unfolded. The inner critic nattered in the lawyer's head, "I hope I finish talking before they finish listening."

Open season

Primacy study data demonstrates that most jurors decide a case during jury selection and early opening statement. From then on, jurors accept evidence if it fits their worldview. Evidence that supports their leaning, they find believable. Evidence that contradicts it? Unreliable. Knowing this, a case's theme and opening narrative take on greater importance.

The theme and narrative should dovetail with one's overall approach to the case. There are many different schools. Rules of the Road, David Ball on Damages, Reptile Theory, and Betrayal Structure are some of the better-known approaches. All have skilled practitioners who studied and built them, and all have record-setting verdicts supporting their efficacy. Rule violations piss jurors off. So does betraying tribal norms. We don't take a position on whether one theory outperforms another. Find an approach that works best for oneself, and the case, and run with it. With that understanding, we provide a tried-and-true opening method that can then be tailored to fit.

Are you not entertained?

Remember that most recent jury summons and just how thrilled you were to show up in court? Jurors don't want to be there. Keep them entertained and embrace their primary learning styles. Roughly 65% are visual learners, 30% are auditory learners, and 5% are kinesthetic learners. Simply talking means 70% won't retain the information. We generally use PowerPoint with almost no text. Most jurors won't read lots of text, and if they are reading, they aren't listening. We also use butcher-block, blow ups, and anatomical or other models. Switching media keeps folks engaged.

Start with orienting folks to place and time even if one thinks the jurors all know the area. Ask two people for directions to the same place and you'll quickly understand that people visualize locations differently. Google Earth is a great tool to bring one from a regional overview down to the place itself. Then step back from the incident. What did the defendant do or fail to do over time that brought us here? If there are standards, practices, or expert input the jury will hear, it is time to become a professor and teach the standards.

Next, delve into the incident itself, preferably with images. And stop. Before we get into injuries, we need to know a little about the plaintiff and how the plaintiff spent time before the incident. Again, visuals. Yet not overboard. There should be more effort spent in opening on defendant's bad acts rather than how sympathetic one's client is. Then comes the time to teach anatomy. While folks may not want to be there, their day can be improved by learning something new. Teach anatomy necessary to understand the injuries the client sustained. A back case? How does the spine work with its bones, nerves, tendons, ligaments, muscles, and blood vessels. Explain the back's significance in movement and as a lever. Show the spine's nerve dermatome patterns and how they enervate specific body regions. Use visuals and a spine model to teach, and with the court's permission, stand close enough to the jury box to show the model's particulars to the jury.

The anatomy lesson foreshadows the injuries, which one goes into next. This includes the treatment arc, the impact on work and everyday living, and the prognosis. Then one gets to economic damages, which are one of the few exceptions to showing jurors text in PowerPoint. Then a discussion about the non-economic damages and how significant the impact was on the client's life. Finally, the ask: "At the end of this case, we will be asking you to find the defendant liable for the incident and to return a verdict in the many millions of dollars." Practitioners debate whether to ask for a specific figure. Our position is that locks one in and requires backpedaling in closing if the evidence comes in better or worse than anticipated.

Don't forget

Bring up the bad points one knows the defense will hit on. Ignoring them will lead to the defense starting out with, "The plaintiff's counsel conveniently told you only half the story. Now you get to hear it all." If the judge will allow it, consider using deposition clips in trial. Finally, should the passion or word choice in opening statement draw an argumentative objection, back up and say the exact same thing with the phrase, "The evidence will show." This gets past 95% of argumentative objections. The defense then hears the same statement twice with the exclamation point an objection draws. Typically, a few rounds of this will taper down objections.

Outro

Back to our lawyer and opening statement. The lawyer finished up and sat down, sensing and hoping that the delivery went well. Time would tell, as it does in trials.

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