STRAIGHT TALK: CRAFTING PERSUASIVE OPENING STATEMENTS AND CLOSING ARGUMENTS*

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> Imagine being forced to take a college course you know nothing about. It could last days, weeks or months; no one knows for sure. The speakers use technical language you don't understand. You can't take notes, ask questions or consult your classmates. On the final exam, you and your classmates have to answer the test questions exactly the same way, or you can't go home. That's what serving on a jury feels like to many people.

I didn't write that analogy, though I wish I had. In six short sentences, it crystallizes the anxiety, confusion, frustration and fear of 12 laypersons charged with deciding a complex civil case. More importantly, it illustrates how crucial it is for attorneys to speak to jurors in plain English, create vivid mental images, and draw parallels between case issues and everyday life experiences.

Opening statements and closing arguments are about connecting with jurors on their own turf. As the French novelist, Anaïs Nin, observed: "We don't see things as they are. We see them as *we* are." Openings and closings are about establishing common ground with jurors, and making them feel comfortable and confident that they can do the job that's expected of them. They are about telling a compelling story that strikes a chord, and makes jurors want to establish truth and punish wrongdoing.

Openings and closings are about truth, trust and credibility. Their wording should be simple and direct, using the active voice. They should reduce complex medical or technical terms to layman's language. As much as possible, sentences should be short and to the point. Jurors are instinctively distrustful of convoluted stories and put off by fancy lawyer jargon. Like most of us, they believe that plain talk is where truth resides.

Openings and closings are about respect for the jury. They should pay tribute to jurors as invaluable instruments in the American civil justice system. They should communicate sincere respect for the jurors' intelligence and ability to sift the evidence, separating the wheat from the

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chaff. They should empower the jurors, imbue them with trust and encourage common-sense judgments.
In a recent closing, I wrote:

> American architect Frank Lloyd Wright once said, "The truth is more important than the facts." That may sound strange, but Mr. Wright knew what he was talking about. Facts can be manipulated. A person may make a statement that is technically correct, but it still may not be true. It may not be the way things really happened. As you listen to the evidence, listen for the truth. You hear facts with your head. You hear truth with your heart. You feel it deep in your gut. Instinctively.

Openings and closings are about drama. They're about playing to the jurors' personal experiences and emotions. They should have a conversational tone and cadence that lends itself to voice inflection and demonstrative gestures. This may be more of a challenge with some cases than with others, but even stories about tedious issues like corporate fraud, stock trades or patent infringements can be told in a way that stirs jurors to come to the defense of the wronged party or raise their hackles against the offender.

Openings and closings are a time to establish high moral ground—to touch a nerve and rouse the desire to stand up for what's right. They are about creating a sense of indignation among the 12 people in that jury box and inciting them to vow *never* to let what happened to your client happen to another person.

Openings and closings are about waking jurors from the sleepwalk of routine, and inspiring them to punish culprits and set an example for justice.

Opening Strategies

Aristotle may have had juries in mind more than 2,200 years ago when he said, "It is simplicity that makes the uneducated more effective than the educated when addressing popular audiences." Simplicity is key to opening statements, in both form and content. A good opening statement highlights the evidence that will be presented, but it doesn't bog down in minutiae.

One of the most common pitfalls that attorneys fall into with their openings is giving *too much detail.* The opening is a syllabus—not the full course of study. It's a snapshot—a general outline of the evidence and witnesses that jurors will hear in the coming days, framed the way the attorney wants them to begin thinking about the case.

The best opening statements *underwhelm* jurors, rather than overwhelm them with information. They highlight the case's strengths and inoculate against its weaknesses. They aren't dissertations or grand masterpieces. They aren't argumentative or accusatory. Instead, they are impassioned short stories—thumbnail sketches, replete with pauses and innuendo. They shine a half-light into which jurors can project their own imaginations and exercise their own opinions.

The novelist John Erskine defined *opinion* as "that exercise of the human will which helps us to make a decision without information." The best opening statements combine drama and suggestion with an orderly, chronological summary of the evidence, giving jurors just enough information to begin forming their own opinions about the case.

The first three to five minutes of the opening statement are what jurors will remember most. This is the time to come out of the gate with a dramatic overture that captures the jury's attention and connects with the jurors emotionally. For example, I wrote the following overture for the opening statement in a wrongful death case in which the father of the bride died less than a month before his daughter's long-awaited wedding:

> Like most young women, Shawn dreamed her whole life of her wedding day. In her mind's eye, she could envision the scene with perfect clarity: She, in her long, flowing gown, smiling through tears of joy as she walks down the aisle on her father's arm. With a proud smile and a kiss, he gives her in marriage to her new husband.
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> (Pointing to a photograph of Shawn and her father at her wedding rehearsal) This is the closest Shawn will ever come to realizing that dream. This photo was taken on the day that Shawn and her father practiced for that special moment that never came . . . because 27 days before Shawn's wedding day, her father died. On what should have been the happiest day of her life, instead of rejoicing with her father, Shawn mourned him.
>
> This case is about precious, irreplaceable lost moments. It's about this particular lost dream, which has left such a gaping hole in Shawn's heart. And it is about scores of other lost moments in her future—moments small and large . . . precious moments and experiences that Shawn will never have with her father. Moments that have been stolen from her by Dr. Gene Trudeau and Memorial Hospital.

The first three to five minutes of the opening statement are the time to lay out major case themes that you will reiterate throughout the trial. One effective technique is the use of mantras—short incantations of three or four lines that capture the essence of those themes. Introduced early in the opening and repeated like a chorus throughout the presentation, a strong mantra sears case themes into the jury's psyche.

I assisted a client with an opening for a case in which a student was killed by a car at a dangerous mid-block crosswalk in front of his school. Fifteen crashes had occurred at the same crosswalk prior to this tragedy, six of which involved students who were hit by cars and survived. The evidence showed that the city had installed an inherently dangerous mid-block crosswalk, when a

safer corner location was only 50 yards away. Once the ill-advised walkway was installed, the city ignored federal standards for cautionary lighting and signage. It was a bad situation—a recipe for disaster.

The opening statement started with a dramatic, emotional overture:

> Rick Jones did not have to die. It shouldn't have been his time. After all, he was only sixteen. Young. Healthy. Full of energy and excitement about the life ahead of him. A teenager who was just beginning to stretch his wings . . . consider his options. Rick Jones did not have to die.
>
> Rick didn't die because he did something wrong. He didn't die because of teenage recklessness or taking chances. He didn't die because he just happened to be in the wrong place at the wrong time.
>
> Rick Jones died because the City handed him a death warrant. The City played Russian roulette with Rick's life—with the lives of every student at Vista Canyon High School—and Rick Jones was the one who finally took the bullet.

The overture was followed by a brief, pointed account of the city's bad decisions in placing the crosswalk. Having established these major case themes, we created a strong mantra to drive them home:

> It was the wrong kind of crosswalk . . .
> At the wrong place . . .
> With the wrong signs.

Then, we began a preview of the evidence, punctuated at regular intervals by the mantra, for emphasis.

Analogies are one of the most effective tools in helping jurors make mental leaps in understanding complex or abstract concepts. A good analogy prompts a lightbulb moment in jurors' minds and prompts them to say, "Now, I understand."

Remember Harper Lee's powerful analogy in *To Kill a Mockingbird,* when Scout explains to her father, Atticus, why he shouldn't report Boo Radley: "It's like killing a mockingbird, isn't it?" This line sums up the heart of the book: A mockingbird is a harmless bird whose sweet harmony makes the world a more pleasant place. In this analogy, the mockingbird symbolizes Boo Radley and Tom Robinson, two peaceful men who never did anyone harm. The analogy caries a clear message: Executing Boo and Tom would be a sin.

No other instrument is as effective as an analogy in creating a human connection and explaining a concept to a panel of jurors with differing levels of education and experience. A good analogy creates shared experiences, provides new viewpoints and gives jurors a better way to relate to your story.

Organization

Writing an opening statement or a closing argument is a structural project. It's like building a house: You have more pieces than you need, so you have to figure out which pieces to use and the simplest, most logical way to put them together in order to end up with the house you want. No house is the same; each house starts with a different set of plans and a different cache of materials. More importantly, you have to put the house together in full view of a set of 12 apprentices. Each of them is building his or her own house, based on your lead. The goal: When you're all finished, you want all 12 of their houses to look exactly like yours.

A few years ago, I coauthored a book called *Start With A Laugh* with Liz Carpenter, who was press secretary to Lady Bird Johnson when LBJ was president. The book is about writing and delivering good speeches. Liz has a blueprint for writing speeches: "Start with a laugh, put the meat in the middle, and wave the flag at the end."

I use a variation of Liz's formula in almost everything I write, including openings and closings. Instead of starting with a laugh, though, I start with drama to engage the audience's attention. Close on the heels of the dramatic overture, I hit hard at the major case themes. When possible, I introduce a mantra during the first few minutes of the opening, and then use it to strike at the heart of the case repeatedly, throughout the presentation.

In any opening, it is important to personalize the plaintiffs for the jury. Upfront, there should be a section that paints a picture for jurors of the plaintiffs' background and character, family life, occupations, accomplishments, community and charitable activities, and other positive aspects of their personal lives.

The next element is a chronological account of the plaintiff's story—the events that brought the plaintiff to court. The story can be particularly riveting when told in the present tense as a real-time diary that puts the jury at the time and place of each event. In laying out this chronology, I like to use single-action sentences and a rhythm that's almost staccato, with virtually no commentary.

Stating the facts clearly and concisely, uninterrupted by editorial analysis, enables jurors to understand the sequence of events. The absence of spin creates trust. Moreover, jurors will be more apt to accept your story during trial if it aligns with the conclusions they began to form for themselves during the opening statement.

In succession, I go through the other fundamentals of an opening, including evidentiary highlights; planned expert testimony; the nature of the defendant's conduct; the timing of the defendant's reaction after he or she had evidence that something was wrong; the defendant's

duty, as compared with that of the plaintiff; inoculation against the defense's main arguments; and so on.
With every element, the key is: Simplicity. Plain English. Straight Talk.

In an opening or a closing, I never hesitate to "wave the flag at the end." The last section of a closing is a perfect opportunity to thank jurors for their service and acknowledge them as powerful figures in American democracy. It's also time to stoke the fires of conscience and speak to the nobleness of jury service:

> By giving ordinary people a central role in the justice system, we put a human face on the law. By entrusting a jury of our peers to decide legal cases, we reinforce our belief that everyday people can be trusted to make the right decisions. We underscore our faith in right versus wrong. We strengthen our belief in the virtues of democracy.

Sometimes, I call forth the spirits and words of great American statesmen or founding fathers. Other times, I use inspiring quotations from authors or philosophers to arouse patriotic ardor or humanitarian instincts. One day, I aspire to write a passage as moving as this one from Frank Galvin's closing argument in *The Verdict,* delivered by the inimitable Paul Newman:

> I mean, there is no justice. The rich win; the poor are powerless. We become tired of hearing people lie. And, after a time, we become dead . . . a little dead. We think of ourselves as victims—and we become victims. We become weak; we doubt ourselves; we doubt our beliefs; we doubt our institutions; and we doubt the law.
>
> But, today, you are the law. You are the law—not some book, not the lawyers, not a marble statue, or the trappings of the court. See, those are just symbols of our desire to be just. They are, in fact, a prayer . . . I mean, a fervent and a frightened prayer . . . If we are to have faith in justice, we need only to believe in ourselves and act with justice.
>
> See . . . I believe there is justice in our hearts.

The closing argument encourages jurors to consider the evidence through the lens of common sense. It prods them to do what's right, even if it's not popular or widely accepted. Don't hesitate to get creative in making your final plea to jurors; an injection of humor might be just the shot in the arm that compels a juror to a just decision:

> Even Supreme Court Chief Justice Earl Warren sometimes found it hard to swim upstream against the tide of public opinion.

> "Everything I did in my life that was worthwhile," he said, "I caught hell for."

Finally, the drumbeat of evidence and argument builds to a finale. This is "damn the torpedoes" time. Orderliness, reality, measurement, science, logic—they have no place in the finale. The final act is about fire and emotion. It's time to cast aside the details of your case and address larger issues—coming to the rescue of the poor or disenfranchised, speaking for those who cannot speak for themselves, preventing what happened to the plaintiff from happening to anyone else.

Gone are the constraints of the opening statement, in which nothing can be stated as fact. The finale is time to take a stand. The finale is the time to cry out for justice. I wrote this finale for a case that involved the wrongful death of a seven-month-old infant:

> Rather than own up to his mistakes, the doctor is here in court today—rolling the dice, trying to avoid responsibility. He's hired some high-priced, heavy-hitting attorneys to gloss over the facts. He's hoping you will buy the line of bull he's feeding you and let him off the hook for Misty's death.
>
> Dr. Parker is saying to Debra and Mike: "Get over it." And he's saying to you, the jury: "Trust me—I'm a doctor."
>
> Once upon a time, he said that same thing to these two young parents—before they knew better. Can you imagine what they would give today, if only they could change their decision to trust Dr. Jared Parker? To get their little girl back? To get their marriage back? To get their very lives back?
>
> Debra and Mike have suffered the most intense pain known to humankind—the loss of a child. A cruel, lifelong pain that offers no refuge, no peace, no end.
>
> They came here to this courtroom, and they put themselves through sheer agony to tell you their story. Not because they are greedy. Not because they have hatred in their hearts. Not for revenge. They did it for one reason: To make sure the same thing doesn't happen to someone else.
>
> Today, Ladies and Gentlemen, you are the law. You have the power to render justice—justice for Misty, justice for Debra and Mike, and justice for all the other parents and children who will pass through Dr. Parker's office in the future. You have the power to make sure that Dr. Parker doesn't leave here and go back to business as usual. That he doesn't harm another child . . . another

family.

> Today, Debra and Mike are speaking for Misty. They are asking you to tell Dr. Parker that human life is precious. I ask you, now, to go back to that jury room and speak for them.

The best opening statements and closing arguments leave jurors in an altered mental state, feeling one or a combination of compelling emotions—anger, sorrow, fear, empathy, despair, indignation and disgust, among them. They leave jurors humble and reverent, feeling the full weight of the responsibility that now rests squarely on their shoulders. Delivered with the passion that is the very essence of plaintiff's law, the best openings and closings trumpet an urgent call to justice that has rung loudly in the ears of American juries for 230 years.