Trial Advocacy

Portals of the jury's verdict

by Charles J. Zauzig III

Never underestimate the power of that moment of first impression with those seven strangers formed just moments before to decide the winner of the contest — the civil jury trial. An impression of a professional, fair, courteous, in command of the facts, and an interesting storyteller must be established in the opening and then retained to verdict. Fail, and the jury will turn their heads to your opponent to find the answers they seek. Never lose grasp of the jury's attention and respect:

> An advocate's most potent weapons are his character and his words, the kind of words he uses and the way he uses them. They are the keys to the magic portals of the jury's verdict.[1]

The first words out of your mouth should draw the jury right into the story you are about to tell. Imagine Charles Dickens beginning *A Tale of Two Cities* with "Readers...you are about to read a novel, fictional not factual, about a period of time..."

By the time you are standing on the brink of delivering your opening, the jury has been introduced to you and you to them; the judge has explained how the case is going to proceed while you were deciding on your peremptory strikes; and you will never be the one to say that what lawyers say in opening is not evidence.

The beginning of your opening is the beginning of your client's story:

> "It was the best of times;
> it was the worst of times."

These simple words draw the readers into the story and make them want to find out more. The lawyer's preparation of the opening should have similar goals. The words need to be simple, the sentences short and the message uncontrived. Wordsmithing takes time, effort, and forethought; it should be a process that begins well before final preparation. Mark Twain said, "It takes three weeks to write a good ad lib speech." The beginning lines of this opening delivered to a jury of seven mothers in a complex medical malpractice trial told them plainly of a tragedy that never should have happened:

> On October 17, 1984, a beautiful little girl was born. Her name is Emily. Emily was born with an injury to her brain. She was born with an injury to her lungs. This case is about how a doctor, an obstetrician, providing good medical care to the mother and child prenatally could have avoided these injuries."

Not only does Virginia law place the restriction on opening statements that they will not be argumentative, common sense tells us that it is too early in the trial to argue. Human nature rebels against being told how we should think or feel about an event. If the jury is guided by facts to a conclusion of their own making, it is probably a conclusion that will be unassailable by your opponent. A lawyer has not yet earned the right to display emotion, to discredit witnesses, or to ask a jury to disregard evidence. This is the time to be even-handed, fair and to display a complete knowledge of the case. Although a vehicle of persuasion, the opening statement is also a trap of hyperbole.

Overstate the case and during the trial you will lose the trust of the jury.

This does not mean, for example, that the opening has to be dry or without a theme to steer the case. The theme needs

to spring naturally from the dynamics of the case. Focus groups are sometimes valuable resources for obtaining thematic context. In a recent orthopedic malpractice trial, a focus group member commented that it seemed to him that the doctor only did half a job. At trial, the jury was told:

> You do not need to choose which nerve root the defendant should have addressed in surgery, because he should have addressed both. When Theresa allowed the defendant to put her to sleep, take a scalpel and cut down through the tissues of her body, and then cut away at the bone of her spine; she trusted that her doctor would not just do half a job.

Since the plaintiff has the advantage of speaking first, the whole story should be given to the jury, including evidence that is more favorable to the other side. This information is going to have to be processed in the decision making, so it may as well be heard first from you in the context of the theory of your case. As in all stages of the trial thorough preparation is the key, but in the context of the opening it is critical that you are not caught unaware of facts and learn them for the first time along with the jury from your opponent. With the tools of discovery and the close inspection of all records, there is no excuse for surprise. Motions in limine provide an opportunity to plan in advance on what needs to be included in the opening, so long as the trial court does not render an equivocal ruling. Dealing with the warts of your case first as just another part of your case not only tells the jury that the evidence is not inconsistent with the plaintiff's right to a verdict, but also that you are a lawyer that they can trust to give them the whole story.

The story given to the jury should contain psychological anchors in which the jurors can fit the facts into their value system. Remember always that your audience is not made up of lawyers or judges and do not have the convoluted logic of our profession. Donald E. Vinson points out:

> Attorneys think inductively and assume others do, too. They present bits and pieces of evidence, expecting jurors to come to a reasoned conclusion. Most people, however, do not reach conclusions inductively. Instead, they make immediate judgments and then seek support for their view from available information. Jurors usually make decisions deductively.
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> They reason from a few fundamental premises to which they fit facts as they are received. . . .As human beings we bring into any situation an inventory of past experiences, attitudes, values, beliefs, and traditions learned at an early age and reinforced throughout our adult life. . . . These beliefs are relatively immutable and form the lens through which we know and understand the world. . . . Psychological anchors must be consistent with the storehouse of attitudes and beliefs jurors bring with them into the courtroom. . . . An attorney should strive to develop three or four psychological anchors that will be factual or emotional, but above all, will be consistent with what the jurors already believe. [2]

Today's jurors embrace a value system of responsibility and accountability, yet they will look first to the plaintiff to have demonstrated this character. A responsible plaintiff has a good work ethic, doesn't overly complain, does their best in the face of adversity, and isn't quick to sue just because they have the right and the law says the defendant is negligent. "Too many people try to take advantage of the system or there are too many frivolous lawsuits in America today," are statements for which you can expect virtual unanimity during *voir dire*. Opening statements must leave your jurors with the opinion that this plaintiff in this case is distinguishable from the frivolous lawsuit and deserves their serious attention. They must identify with the plaintiff. In Plato's *Republic*, Polemarchus poses the dilemma to Socrates. "But can you persuade us, if we refuse to listen to you?" Shared values open ears.

One of the important roles of the advocate at this critical stage of the trial is that of a teacher. If there is evidence of a medical, scientific, or technical nature, you have the unique opportunity to present this material in exactly the manner that you design to give them a baseline understanding. Teach them as if you are the expert. For example, explain the anatomy of the body part injured, the mechanism of the injury and how it alters the integrity of the anatomy and describe the surgical process that corrected the injury. Not only does this process demonstrate your competency in this area, but it makes your expert's job easier when he takes the stand. By the time the plaintiff's expert testifies, the jury's knowledge gained in the opening has been strengthened. By the time the defense experts testify, the jurors will be irritated if they have to listen to the basics for yet another time.

The use of demonstrative evidence such as models are extremely helpful in crystallizing key points of the subject matter, and they will better remember those points during the trial when that same model is being used by the experts. In fact, the more visual material that you can incorporate into the opening, the interest level of your listeners increases, as does their memory. Studies have shown that if you merely tell with words, the listener will remember 20 percent of what you told

them; but if you couple your words with visual aids there is an 85 percent retention level. Exhibits such as photographs or blowups of documents bring immediate understanding of the message you are conveying. Pretrial orders or even motions in limine should dispel any question about the admissibility of the exhibit at trial. There should be no reason then that the exhibit could not be used at opening. Showing the jury a photo of a significant accident scene will not only allow each juror to reach their own conclusion as to its severity, they will intuitively use deductive logic that the plaintiff must have been injured. Using words to describe impact and property damage will undoubtedly have the jurors thinking, "Well, you are going to have to prove to me that it was as bad as you say." Adding the dynamic of visual proof will have them thinking, "My God, what happened to the people in that car!" Many of the goals of Aristotelian rhetoric have been instantly accomplished: Ethos (the listeners belief in the personal character of the speaker, Pathos (the emotions of the listener are engaged), and Logos (there is proof that logically supports the position).

Word-smithing, however, cannot be ignored. Though simple, the words used should evoke imagery. The same word appropriately used in one case would appear out of place in another including the danger of overstatement. The word "die" connotes among other meanings a benign demise. The word "kill" means that there was another actor who caused a wrongful demise. "Murder" is both sinister and criminal. In a wrongful death due to negligence the word murder would be gross exaggeration and would in all likelihood create an unfavorable reaction from the jury. The right word needs no adjectives or adverbs and moves the listener deeper into the story. The advocate engages a jury's imagination and empathy. Tools for finding the right word can be as simple as using a thesaurus or Bartlett's Quotations.

The structure of the opening remains flexible, limited only by imagination. However, certain axioms bear consideration. All stories have a beginning, a middle, and an end and each stage should be well planned. To begin the story to capture the immediate interest of the audience, to sustain that interest in the middle, and to conclude with a memorable message are the characteristics of a well designed narrative. Authors use the technique of building anticipation of what is going to happen to make their readers continue to see what happens next. Careful use of analogies and similes are useful in tying the point made to an image or experience. If caution is not used, however, a sharp adversary may turn that analogy against you. One of the most powerful tools that can be utilized is that of trilogies or the power of three. Julius Caesar wielded the trilogy when he exclaimed, "Veni, vidi, vici." (I came, I saw, I conquered.) Trilogies are often incorporated into parallel statements. For example, in a loss of a mother "to lose a friend is tragic, to lose a protector is fearful, to lose your family is horrific...to lose a mother is all of these."

Powerful opening statements spring from preparation and insight into what moves seven human beings to the desired decision. Some authors have suggested that 80 percent of jurors make their decisions at this stage of the trial and are not persuaded to a contrary position thereafter. Assuming this finding is true, the advocate's effort in crafting the opening statement is well placed. The verdict is the reward.

Endnotes

1. *The Art of Advocacy*, Lloyd Paul Stryker, pg. 56.
2. Donald E. Vinson, *Litigation*, Volume 8, No. 2, Winter 1982, pg. 20.

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