The Theory of the Case

By James A. Johnson

> "Give me an effective voir dire and opening statement, and as long as the trial lawyer maintains his or her credibility, the case is won." —Gerry Spence

In my experience, preparation is the key to success at trial. The first step is preparing a theory of the case. The theory is a persuasive explanation of the events at issue in your case. The trial lawyer should construct a theory on uncontested facts. As you proceed with preparation, keep developing more theories until you have found the best one.

Next, develop a theme: a one-sentence summary of your theory. The theory of the case is the basic underlying idea that explains the legal theory and factual background. It ties the evidence into a coherent whole. I've found that the opening statement is where to start. The jury is highly attentive and eager to learn what the case is all about. Do not waste precious time explaining to the jury the purpose of opening statement. Instead, give them your theory of the case with a memorable theme that will stay with them and shape their understanding throughout the trial. For example, "This is a case about a broken promise."

Do not engage in a lifeless, dull recitation of each witness's testimony. Who will testify to what fact is unnecessary in my experience. Allow the jury the joy of discovery of the evidence. Now is the time to grab attention with a thematic opening paragraph that discloses your overall position in capsule form.[1] Plausibility and simplicity are the keys. The closer your case is aligned with basic probabilities, the more likely the jury will be led to decide in your favor. A broken promise is easily understood by jurors—a broken contract, a broken agreement to sell a car, or a broken lease.

Advocacy

Based upon my experiences, a good theory provides a comfortable viewpoint from which the jury can look at all the evidence, and it is the hallmark of a consummate advocate. The theory of the case helps you decide which witnesses to call and in what order. The rule of primacy teaches that what is heard first tends to be most difficult to dislodge. The plaintiff and prosecutor have the advantage of going first.

Persuasion is an art practiced in its most subtle form in the opening. The selection of facts and the order in which they unfold suggest the desired conclusion. Do not argue the facts. Let the facts argue for you. For example, if the plaintiff begins his opening statement with, "This is a case about a broken promise," the defense can state, "Ladies and gentlemen, this is not a case about contracts. *This is a case about arson*—the intentional and deliberate burning of a house for the purpose of collecting the proceeds of a homeowner's insurance policy. We intend to prove by the evidence that Mr. Jones intentionally set his home on fire."

Direct examination

The goal on direct examination is winning the hearts and mind of the jurors. Treat the witness with warmth and sensitivity. Do not begin with, "Mr. Jones, state your full name for the record." Rather start with, "Would you please introduce yourself to the jury by providing your name, address, family, and what you do for a living?" When you spend some time on the witness's background, the witness becomes more conversational and believable.

Use topical headings when you move from one subject to another.[2] "Now that you

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have told us about the big charcoal spot in the basement, what did you do with the cinders?" The choice of words is very important. The choice of the right word or words grows out of your knowledge of the values of the community—local, regional, and national.

Prior bad acts

Another example of the importance of the selection of the theory of the case is demonstrated by Federal Rule of Evidence 404(b) (except for a few minor differences, Michigan Rule of Evidence 404(b) is nearly identical to FRE 404(b)):

1. Prohibited Uses. Evidence of any other crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.
2. Permitted Uses, Notice in a Criminal Case. This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. On request by the defendant in a criminal case, the prosecutor must *(a) provide reasonable notice of the general nature of any such evidence that the prosecutor intends to offer at trial and (b) do so in writing before trial—or in any form during trial if the court, for good cause, excuses lack of pretrial notice*[3] (emphasis added).

FRE 404(b) is two-pronged. The first prong forbids the introduction of evidence of the defendant's uncharged crimes or prior bad acts simply to show he is a bad person. Uncharged misconduct testimony stigmatizes the defendant and can predispose the jury to convict. The second prong permits the admission of uncharged misconduct evidence of logical non-character relevance.

Prosecutors often shape their case theory to ensure the admission of uncharged misconduct evidence. For example, an indictment alleging a conspiracy will also include a general allegation of a course of conduct in addition to specific crimes as overt acts. The prosecutor is not limited to overt acts mentioned in the indictment. If the other acts appear as part of the same ongoing criminal plan, testimony about related uncharged misconduct is admissible. In this scenario, the choice of the theory of the case is extremely important. Rule 404(b) can also influence the defense's choice of affirmative defenses.

Notwithstanding the possible admissibility of FRE 404(b) and MRE 404(b) evidence on a non-character theory, the evidence may still be excluded. Under FRE 403, which is identical to MRE 403, "The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence."

Conclusion

Many cases are won or lost before trial. Selecting the right theory can increase your chances of success. The theory of the case is the basic, underlying idea that explains the legal theory and factual background. The opening statement is the time to present your theory or theme of the case. Opening statement is an opportunity almost too good to be true. The advocate can address the jury uninterrupted with a thematic opening. The theory of the case affects your opening statement, direct examination, cross examination, and final argument. It also helps determine which witnesses to call and in what order. Never do anything inconsistent with the theory of the case.

Take the advice of Connecticut Appellate Court Judge David S. Lavine. A former state Superior Court judge and assistant U.S. district attorney, Lavine believes that mastering a case means stepping into the shoes of your audience. Counsel must recognize early on the need to properly identify your audience and tailor your arguments to its needs. In his book, *The Cardinal Rules of Advocacy*, he also emphasizes the necessity to think creatively in advance of trial.[4]

If you have any questions, do not call me. I will be in court delivering my thematic opening statement, without notes, in a conversational tone and while making eye contact with each juror. ■

This article is dedicated to Judge Davis S. Lavine of the Connecticut Appellate Court.

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ENDNOTES

1. Johnson, *Persuasion in Opening Statement: Generating Interest in a Convincing Manner*, 90 Mich B J 42 (January 2011), available at <https://www.michbar.org/file/barjournal/article/documents/pdf4article1805.pdf> [https://perma.cc/U2FG-BFST].
2. Nizer, *My Life in Court* (New York: Doubleday & Co. 1961) and Johnson, *The Art of Direct Examination*, 89 NY State Bar Assoc J 21 (2017).
3. Johnson, *Uncharged Misconduct Under Rule 404(b)*, 98 Mich B J 24 (May 2019), available at <http://www.michbar.org/file/barjournal/article/documents/pdf4article3649.pdf> [https://perma.cc/VSS4-4RGD].
4. Lavine, *Cardinal Rules of Advocacy: Understanding and Mastering Fundamental Principles of Persuasion* (Louisville: Nat'l Inst for Trial Advocacy, 2002).