



Persuasion in Opening Statement

Generating Interest in a Convincing Manner

By James A. Johnson

Setting aside voir dire, opening statement is the first opportunity to persuasively communicate with the jury without interruption. We are dealing with the modern jury, a sophisticated group of citizens with preconceptions and expectations for compelling presentations. It is an awesome opportunity to inoculate the jury and deliver a detailed narrative that personalizes your client and states your client's cause in a manner that epitomizes your theory. The opening statement, if properly presented, should persuade, and in some instances, move the jury to tears. It is an opportunity almost too good to be true, and it is so important that it should never be waived. In Michigan, the court may enter judgment on the opening statement for failure of counsel to disclose all the essential factual elements necessary to

establish a cause of action.¹ Moreover, the Michigan Court Rules require an opening statement by both parties, and it can only be waived with the consent of the court and opposing counsel. MCR 2.507(A) states:

Before the introduction of evidence, the attorney for the party who is to commence the evidence *must* make a full and fair statement of that party's case and the facts the party intends to prove. Immediately thereafter or immediately before the introduction of evidence by the adverse party, the attorney for the adverse party *must* make a like statement. Opening statements may be waived with the consent of the court and the opposing attorney. [Emphasis added.]



FAST FACTS

The advocate should use every phase of trial to persuade. Persuasion is an art practiced in its most subtle form in the opening.

The defendant in a criminal case needs a good theme, just as much as, if not more than, the plaintiff in a civil case. For example: "This is a case of self-defense."

For example: "This is a case about a broken promise." It does not matter if your case is simple or complex—follow these time honored techniques in both state and federal court.

The purists will tell you that counsel should speak to the jury in a professional and dispassionate manner. They believe that what the jury wants to hear at the beginning of the trial is an explanation of what the lawsuit is about. With this view, they outline the elements of the case so that the jurors will have a better understanding of what to expect and what to look for as the evidence unfolds. Finally, the purists insist that the opening statement should not be argumentative. Attorneys who adhere to this view are right in general and wrong in particular. An effective opening statement should subtly border on final argument. Counsel should create a scene in opening statement that is indelibly fixed in the minds of the jurors. *A lawyer who fails to argue the client's case in opening statement consistent with the canons of ethics and within the rules of procedure and evidence is simply not doing his or her job.*

A consummate trial lawyer may hear an objection from opposing counsel—"Your Honor, he is arguing his case" or "He's summing up." If you hear those words occasionally during your opening statement, you have arrived as a trial lawyer. The objection is easily put to rest by repeating the magic words, "The evidence will show" or "I mean to prove that..." In opening statement, counsel should be right on the edge of summation.

The advocate should use every phase of trial to persuade. Persuasion is an art practiced in its most subtle form in the opening statement. Whether a trial judge views your statements as argument is more a matter of your tone than content. If you think you have crossed the line, lower your voice and back up one step. The key is the selective use of language and the choice of words. Language is crucial to your case. The use of the right word, the right phrase, and the right sentence accomplishes in that perfectly subtle manner the creation of the proper subconscious mood of feeling that no amount of emotional appeal can equal. Also, the selection of facts and the order in which they are presented suggest the desired conclusion. Let the facts argue for you, without the use of conclusory language. Cadence, rhythm, tempo, and even your demeanor are effective persuasion techniques. A big pause lets the impact of what you just said sink in. A pause with a gesture, like taking off your glasses, forces the jury to think about your last statement and leaves them eager to hear what is coming next. A moment of complete silence is even more powerful.

Goals

Theoretically, the purpose of opening statement is to assist the jury to understand the testimony that will be introduced during the trial as it bears upon the salient issues. The rule of primacy teaches that what is heard first tends to be the most difficult to dislodge from someone's mind. The goal of the plaintiff's lawyer is to take full advantage of the law of primacy. At the beginning of opening statement, the jury is highly attentive and eager to learn what the case is all about. Do not waste precious minutes lecturing the jury about the purpose of opening statement. Instead, give them the theme of the case that will remain with them and shape their understanding throughout the trial.

Impact Phrases

You should use impact words and phrases in opening statement. They provide a word picture and evoke images in the minds of the jurors. For plaintiff's lawyers, impact words like "collision" and "mangled" should be used instead of "accident" and "crushed," which are appropriate for defense lawyers. An impact phrase such as "He is a prisoner in a wheelchair" is attention grabbing and goes right to the hearts, minds, and viscera of the jurors. And impact phrases have a lasting effect. At the beginning of the trial, the jury is at the peak of attention. Accordingly, plaintiff's and defense counsel should present an attention-getting statement of

44 Persuasion in Opening Statement

the theory of the case. But be careful. Do not overdo it. Be selective. Use the right impact phrases that also appeal to reason. Here's a sampling:

"This is a case about a person who is less than a man and more than a man. Less than a man because...."

"Accidents don't just happen...they are caused...by people."

"This lady is the mother of a boy who was killed at a railroad crossing."

"It is too late once the ball has been snapped for the coach to send in a different play."

"This is a case about a broken promise."

"This is not a case about justice.... This is a case about injustice. Only you, through your verdict, can do justice."

"This is a case about risk, rules, and responsibilities."

When you deliver your opening statement, do not engage in a lifeless, dull recitation of each witness's testimony. A tedious prediction of who will testify about what fact or event is not necessary. Allow the jury the joy of discovery during the evidence. A simple narrative permits the relevant connections to be made because they will occur naturally, as the story unfolds. The opening statement should be presented as a continuous persuasive story with a simple theme—the theory of the case. Create a theme that is carefully defined and artfully articulated and tells a human interest story. The first paragraph of the opening statement should develop the theme of your case and disclose your overall position in capsule form. Here is an example:

"Ladies and gentlemen of the jury, *this is a case about a broken promise*. John Smith entered into an agreement with XYZ Insurance Company and paid his premiums religiously for five years. Mr. Smith bought a promise when he purchased his automobile liability policy: to protect him from this very type of loss. He relied on his paid-for promise and rightfully so, with piece of mind, knowing that when he put his trust in the hands of XYZ Insurance Company, he would be secure, safe, and protected. This lawsuit was filed because an unknown hit-and-run driver rear-ended Mr. Smith's car and then sped off—out of sight. Nobody knows where that pickup truck is to this very day. Because of the collision, John suffered a ruptured lumbar vertebrae, or what is commonly called a broken back. He will have this injury for the rest of his life. After he promptly notified XYZ Insurance Company of the collision, knowing that he had uninsured motorist coverage that provides protection for this very type of situation, XYZ refused to honor its promise. *A promise made is a debt unpaid.*"

Keep in mind that if you represent the defendant, you can easily arrange the persuasion techniques in favor of the defendant.

Another tool that should be in every litigator's arsenal is PowerPoint. Integrating PowerPoint in your opening statement enables you to create visual images in the jurors' minds. Pictures are attention getters and attention keepers that will enhance your trial presentation by making it very persuasive and more memorable. Combining words with pictures is the key to persuasive commu-

Get up and say something! Stress how important it is to everyone, not only the defendant, that the safeguards of the presumption of innocence be rigorously applied.

nication in telling your client's story in a way that also motivates and inspires.

Rhetorical Questions

Asking questions and providing the right answers piques the jury's interest. An example of the use of rhetorical questions in opening statement is in order:

"Members of the jury, you must be asking yourselves who is Mike Brown and what does he want? He is a truck driver who works with his hands, loading and unloading 50-pound boxes of cranberries for Acme Corporation. What does he want? He wants to justify your decision to compensate him with substantial money damages. Who is the defendant? The defendant is XYZ Corporation. It is the reason why you 12 good citizens of the community have been chosen to perform a next-to-divine purpose—the rendering of justice. What did XYZ Corporation do? Well, that takes us back to October 8, 2007. On that day...."

The questions presented in the dialogue are the same questions that arise in the minds of the jury and the trial judge. Properly employed rhetorical questions are very persuasive.

The Defense Must Open

The defendant in a criminal case needs a good theme, just as much as, if not more than, the plaintiff in a civil case. For example: "This is a case of self-defense." Or if you can carefully talk about the burden of proof in opening statement, you have made great strides in improving your chances of an acquittal or a hung jury. Even when you have no real defense, never waive the opportunity to communicate with the jury. Get up and say something! Stress how important it is to everyone, not only the defendant, that the safeguards of the presumption of innocence be rigorously applied. Explain that the presumption of innocence does not end when the trial starts, but continues until and unless the prosecution presents believable evidence to the jury's satisfaction beyond a reasonable doubt on each and every element of the charged offenses.

In both state and federal court, I have too often seen defense counsel announce to the court, "Your Honor, we will reserve our opening statement." Without showing outward emotion, I cringe. Reserve your opening? Reserve what? The prosecution has just painted a picture of your client as a person who deals in drugs and conspires with those who sell them. Drugs have permeated our society and ruined thousands of lives, even some of the children, spouses, and friends of the jurors. Counsel must get up and change

Checklist of Dos and Don'ts

1. **Do** be in control of the courtroom before the jurors are seated.
2. **Do** develop a style to communicate with jurors so that they come to like you.
3. **Do** be persuasive by establishing a theme that is artfully articulated and will resonate with jurors.
4. **Do** be brief: 15 minutes or less; complex cases a little longer.
5. **Do** personalize your client.
6. **Do** reveal your weaknesses before your adversary does.
7. **Do** use demonstrative evidence: seek a stipulation from opposing counsel and get permission from the judge in pretrial conference.
8. **Do** maintain eye contact with each juror.
9. **Do** simultaneously try three cases: one for the jury, one for the judge, and one for the appellate court.
10. **Don't** apologize for any aspect of your case.
11. **Don't** tell the jury that what you say is not evidence.
12. **Don't** promise anything that will not be proven by the evidence.
13. **Don't** overstate your case.
14. **Don't** forget that your primary audience is the jury, so keep it simple but at the same time carefully perfect your record for appeal, if needed.
15. **Don't** use repeatedly the words "we will prove" or "the evidence will show." Use those words only once at the beginning and deliver your opening in a narrative form.
16. **Don't** waive opening statement, ever.

that picture or at least neutralize it—by showing that your client did not knowingly, with specific intent, violate the controlled substance laws. Defense counsel must remember that you are trying the case to the jury and not the judge. The rule of primacy dictates that defense counsel make an opening statement. You must defuse and neutralize the rule of primacy. *Get up! Get up! Get up!* Talk about how the burden of proof never shifts to the defendant. Tell the jurors in opening that "not guilty" means "not proved guilty." Early on, you must touch the hearts and minds of the jurors by showing how wrong these charges against the accused are. If you wait until the prosecution rests to begin your opening statement in a criminal case, you have—with rare exception—just sent your client to prison. Every criminal defense lawyer should know that it is an uphill climb. The criminal defendant is at a disadvantage from the beginning. The jury is thinking, He or she must have done something wrong; otherwise there would not be a trial.

Preparation

Patrick Henry said it best: "I have but one lamp by which my feet are guided, and that is the lamp of experience."² How does the young lawyer get experience? One way is to take the advice of the proverbial drunk, wrapped around a street light post who responded to an inquiry by a neatly dressed young gentleman carrying a cello: How do I get to Carnegie Hall? *Practice! Practice! Practice!* Persuasive advocacy takes a good deal of concentrated thought and imagination. *The opening statement must be prepared and rehearsed in advance.* Meticulous preparation yields dividends.

For additional guidelines and techniques in opening statement, read manuals and transcripts and attend seminars on trial practice. After you do that, reread this article. If you have any questions, do not call me, because I will be in court delivering my opening statement, where opposing counsel will rise to his feet and say, "Your Honor, he's doing it AGAIN." ■



© James A. Johnson

James A. Johnson, of James A. Johnson, Esq. in Southfield, is a trial lawyer who concentrates on serious personal injury cases. Mr. Johnson is an active member of the Michigan, Massachusetts, Texas, and United States Supreme Court Bars. He can be reached at (248) 351-4808 or through his website at www.JamesAJohnsonEsq.com.

This article is dedicated to David W. Christensen, a partner in the Detroit personal injury firm of Charfoos & Christensen PC.

FOOTNOTES

1. *Vida v Miller Allied Industries, Inc*, 347 Mich 257; 79 NW2d 493 (1956).
2. Speech at the Virginia Convention, Richmond, March 23, 1775, in Beck, ed, *Bartlett's Familiar Quotations* (15th ed) (Boston: Little, Brown & Company, 1980), p 383.