Top Ten Tips:

Effective Opening Statements and Closing Arguments

By Thomas O'Toole and Jill D. Schmid

The end of the year is a popular time for Top Ten lists. In the spirit of this month's "wrap-up" theme, we figured it was time to publish our Top Ten tips for developing effective opening statements and closing arguments.

Entertain Your Audience

Like it or not, the human brain takes a break roughly every 10 minutes. Neuropsychology studies utilizing FRMI machines have confirmed it and there is nothing you can do to stop it. It will happen and the burden is on you to recapture jurors' attention.

Variety in the style of presentation is one of the simplest ways to accomplish this. Simple, periodic shifts from PowerPoint to video clips to exhibits on projectors and graphics printed on large boards in the courtroom cue the neurons in the brains of your jurors to refocus on, and make sense of, these environmental changes.

Develop a Clear Structure with Transitions

Structure is vital. Poor structure can undermine great substance. Yet this is the most common problem we see in openings and closings.

Too many attorneys assume it will be obvious to the jurors when they are done with one point and moving on to the next. Additionally, if jurors' brains are going to demand a break, attorneys can take control of the process by providing structure and effective transitions.

One attorney we worked with set five colored file folders at his table during his opening statement (the same could be done for closing), each representing one of the five key issues he would discuss. When finished with one issue, he would close the file folder, walk back to the table, exchange it for the next, and return to the podium to begin discussion of the new issue.

Not only did this provide jurors with brief mental breaks, it offered a visual as well as verbal structure that told jurors when the discussion of evidence and testimony relevant to one topic began and ended, thereby making it crystal clear which evidence was relevant to which issue.

Incorporate Visual Elements

We've written about the importance of using visuals many times, but it cannot be overemphasized: Effective visuals are an absolute necessity. We live in a visual culture and the tired excuses of "I just don't use visuals," "I don't want to be too slick" or "I don't have time to prepare them" are just that – *tired excuses*.

Read any research article on memory and you will find that the incorporation of visuals into a presentation will increase retention. For opening, visuals help jurors retain your framework, which will lead to better comprehension of the evidence and testimony as it unfolds during trial. For closing, visuals will help jurors' ability to articulate your arguments to other jurors who might not yet have been persuaded by your case.

You have leeway in the exact type or style of the visuals you choose (perhaps you like boards better than PowerPoint), but using visuals is critical. Bottom-line visuals: 1) focus structure and transitions; 2) clarify key concepts; 3) keep track of who's who; 4) explain complex concepts or processes; and 5) preview and summarize testimony.

Prepare in Advance

An attorney once told us he preferred to wait until the night before trial to prepare his opening, primarily because he liked the sense of spontaneity and genuineness that this gave his opening. Not only does this approach grossly overestimate the attorney's ability to provide a clear and coherent framework for what, to jurors, is a complex matter (see the "Kruger Dunning Effect"), it violates the fundamental rules of public speaking that have been universally accepted since the days of Plato and Aristotle.

Studies have shown that people tend to drastically overestimate their ability to clearly communicate information.[1] The only way to overcome this hurdle is through practice and preparation.

For jurors, a trial is like trying to put together a puzzle and, to extend the metaphor, opening statements are like the picture on the box cover. To deliver an opening statement without adequate preparation and/or practice is akin to simply throwing all of the puzzle pieces on the ground and asking jurors to figure out on their own what the picture is. This strategy is dangerous, especially since opposing counsel will be ready to offer an alternative picture.

How do you prepare closing in advance? Start with your opening. Assuming your opening set the framework for your case and included modules of the key issues the jury would address, the same structure should work for closing, but this time it will be supplemented with what jurors actually heard and saw in trial.

Therefore, take your opening structure (your outline), put each point or issue on a separate piece of paper (this could even be done on oversize sheets that hang in the war room) and at the end of each trial day fill in evidence or testimony that proved that point. At the end, you have a rough outline of your closing that simply needs fine-tuning. This is an excellent way to work on closing every day, plus it helps the trial team remember the key moments that proved your case.

Use Jury Instructions to Your Benefit

Legal terminology can often be a significant stumbling block for jurors, especially when the everyday use of a term varies from the legal use of the term. In other instances, the lack of familiarity with a legal term can leave it wide open for interpretation.

Attorneys can prevent adverse interpretations and uses of legal instructions by identifying key instructions and explaining to jurors how those instructions should be used to navigate the verdict form. For opening, try to get the judge to pre-instruct on critical instructions and then make sure to incorporate that language into your presentation. This will help jurors begin making the necessary connections.

For closing, if the instruction is helpful to your argument, you must do more than simply mention it. Use a three-step process: put the instruction on a large board (highlight the key language); link the language to the evidence (*e.g.*, the document or trial testimony); and then link the evidence to the verdict form question.

This provides a visual roadmap for how to answer the verdict form questions in your favor. By doing this, a jury

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is much more likely to remember the instruction and the evidence, and know what they are supposed to do with both.

Identify Hurdles for the Other Side

Research has shown that a balanced or two-sided argument is significantly more persuasive than a one-sided argument. Avoiding one's weaknesses (your opponent's strengths or key arguments) is ceding that ground to the other side without putting up a fight — plus, you lose credibility, since everyone believes that there are "always two sides to a story."

In opening, you want to set the bar high by prefacing what your opposition is going to try to prove *and* why they are flat wrong — it's not enough to simply raise the issue, you need to actually refute it. Along with the value of a two-sided argument, there is real power in forewarning an audience of another's persuasive attempts. By doing so, you are effectively arming jurors to adopt a critical approach as they listen to the evidence and testimony that is presented by the other side.

In closing, remind jurors how the evidence and testimony supported your position, not your opposition's. Lay out the arguments side by side, building your supportive evidence as you refute theirs. Essentially you are showing jurors the implications or errors associated with the opposing side's theory of the case, thus decreasing juror motivation to find in their favor.

Establish a Dichotomous Framework

If you have ever seen American psychologist Joseph Jastrow's "rabbit-duck," you know that its defining characteristic is the fact that the image can either be seen as a duck or a rabbit, but not both at the same time.

The image speaks to a larger psychological phenomenon in which our brains are incapable of comprehending two distinct items at the same moment in time. Your client's narrative should function in the same way in comparison to the narrative presented by the other side. In other words, your client's story should not be able to exist in the world of the opposing party's narrative.

Otherwise, while you may have provided jurors with a reason to embrace your story, you have not provided them a reason to reject that of the other side, which places you in dangerous territory. Remembering the tip about presenting a two-sided argument and the summary, your framework should present a competing version of reality — one in which you address the opposition's arguments by pointing out how their supposed answer cannot exist when placed within the "proper" framework.

Utilize Key Testimony

For opening — utilize deposition testimony: We often hear, "They'll clean up Mr. Smith before trial, so we can't count on him doing ... [some negative trait]." They can "clean him up" all they want, but if he is on video being belligerent, saying something different than he might in trial or having convenient memory lapses, use it.

Just like jurors will believe what was written at the time (*e.g.*, an email written "then" as opposed to the CEO's testimony about what that email really means "now"), jurors are more likely to believe the deposition testimony. The deposition testimony can help undermine the credibility of the witness before he takes the stand; therefore, the first task of your opponent must be to restore his credibility, which impedes his ability to effectively tell his story.

For closing — call out key testimony: Just like jurors will not remember each piece of evidence they were shown, they are not going to remember what each witness said. So, provide jurors with visual "call-outs" of the trial transcript. This will refresh jurors' memories as well as tie the testimony to specific verdict form questions.

Of course, this requires that the trial transcripts are available and a member of the trial team is assigned the task of tracking the key testimony. But if you've been using your opening outline as the basis for your closing throughout trial, key testimony should have already been written in, thus you haven't forgotten it as well.

Connect the Dots

With the benefit of having worked on a case for months, if not years, attorneys often take for granted the ease with which they are able to understand how and why certain evidence or testimony speaks to a particular verdict form question. However, this connection is not always apparent to jurors, even after weeks or months of trial.

Jurors are bombarded with tremendous amounts of information over the course of the trial, often without knowing what the verdict form questions and jury instructions will be. Asking them to determine on their own which evidence goes with which verdict form question is akin to asking someone to complete a puzzle without providing the picture on the front of the box. Connect the dots by:

Walking jurors through the verdict form: Jurors who are motivated to serve as your advocates in the deliberation room must know the path to a favorable verdict, which is not always clear with special verdict forms containing numerous questions and "skip" instructions. This will also provide you with the opportunity to make it very clear which evidence is relevant to an issue such as negligence, as opposed to proximate cause.

Identifying key exhibits: If everything is important, nothing is important. It is highly unlikely that jurors will sort through all of the exhibits sent back to the deliberation room, especially in cases where there are hundreds or thousands of exhibits.

That presents attorneys with two options: Let the jurors decide for themselves which exhibits are most important or do the work for them and identify the key exhibits that will lead them to the verdict that favors your client. One of the most effective closing arguments we have seen is one in which the attorney said to jurors, "There are only six exhibits you need to look at in deliberations." He then proceeded to walk the jurors through each of those exhibits as the jurors took careful notes.

Provide Comparisons on the Burden of Proof

Any trial comes down to what has been proven. Each side presents its evidence and testimony and jurors are left to determine whether the various evidentiary burdens have been met.

Rather than leave this determination to jurors, simply show them. Plaintiffs and defendants alike can benefit from simple visual comparisons of what was required to be proven by law versus what was actually proven. This can be as simple as two columns (what needed to be proven versus what was actually proven) with bullet points summarizing (ideally in sound-bite form) the key points on each. Plaintiffs want to emphasize how they have exceeded the burden of proof and defendants want to demonstrate how plaintiffs have failed to fulfill their burden. ■

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[1] Newton, L. "Overconfidence in the Communication of Intent: Heard and Unheard Melodies," unpublished doctoral dissertation (Stanford, CA: Stanford University, 1990).