

In Opening Argument, Tell Your Client's Story

By **John Buckley and Alice Hector** John Buckley is a partner in the Chicago, Illinois, office of Ungaretti & Harris, LLP, whose practice includes representing policyholders in insurance coverage litigation, defending mass tort and class actions, and general commercial litigation. He can be reached at jpbuckley@uhlaw.com. **Alice Hector**, a shareholder in the Miami, Florida, office of Akerman Senterfitt, represents a wide range of clients in complex commercial and trust and estate litigation. Hector has also taught trial practice and litigation skills for 30 years. She can be reached at alice.hector@akerman.com.

Imagine you are a parent. You hold the car keys. Your teenaged daughter wants to go out with her friends and needs your wheels to accomplish this desire. She has explained her plans, promised to be home by midnight, sworn off alcoholic intake for the night (actually, she denies ever doing that anyway). You are unimpressed with the presentation. She cajoles, begs, pleads, then cries. This does not sway you either. In tears, she blurts out the defining words any advocate needs to hear: "I wish you could see it from my point of view." "Eureka!" you exclaim. "Does that mean I get the keys?" your daughter asks. "No," you respond, "But you have just helped me structure my next opening argument!"

Get the listener to see the story from your side. That is the objective of any persuasive opening argument. Several steps can help you do the trick. First, tell a story from your client's perspective. Second, keep the jury's attention, enhance its retention, and draw the jurors into the case with well-used educational and trial techniques. Finally, empower the jury to make a decision, and ask it for a verdict in your client's favor.

Bring Your Story to the Jury

First, tell a story. *Your client's* story, from his or her perspective, in a manner that draws the jurors into the story. A number of techniques can be used to entice them in. Use the present tense. Take them back in time to 1990, when the injury occurred. Tell the story as if you and the jurors are witnessing it as it happens. If you represent the plaintiff, rather than telling them that Frank went to see Dr. Brown and Dr. Brown brushed him off, put it in the present tense. "Frank gets up in the morning, and he feels like he is losing control. The depression is overwhelming. He goes to see Dr. Brown in a last ditch effort to get help for himself. He sees Dr. Brown, tells Dr. Brown he is thinking about taking his own life. What does Dr. Brown do? He ushers Frank out to an office assistant who hands Frank a sheet of paper and shows him the door. Just like that." Help jurors experience what Frank experienced and your opening will be much more memorable.

If you are representing the defendant, refocus the case and present your client's view of the facts. "This is not a case about medical malpractice. It is a case about a patient who goes back on his word to call the referral hotline, a word he gave to his doctor, a doctor who has known him for 20 years." Then tell the story from Dr. Brown's perspective, about a patient who demonstrates he can follow instructions by coming in that day for a follow-up, not an emergency visit, but a routine follow-up; who makes an off-hand comment indicating he is despondent and may as well just end it all; whom you refer to specialized care, and who promises you he will get the help he needs. Who then goes out, decides he cannot return home as promised after driving all the way there, goes to the drugstore, decides to buy razor blades, then goes to a favorite spot and thinks for a while before slashing his wrists. Tell and sell the perspective that this case is about personal responsibility, not medical malpractice.

Keep Their Attention

Second, use proven educational devices to keep juror attention. People learn primarily in three ways: aural (hearing), visual (seeing), and kinesthetic (touching or feeling). The aural learner hears things better than he sees them. So tell him how to get there, rather than showing him a map. The visual learner learns better by watching or seeing. She sees your point, literally. Give her a map or, better yet, drive her there once, and she will find her way from then on. Kinesthetic learners are the rarest and most difficult to teach. They learn how to do something by doing it themselves. Thus, you must be more creative to reach them through their primary learning mode at trial. Sometimes you cannot, but it is important to recognize these primary learning methods and to play to as many of them as you can during the trial.

These primary modes of learning are opportunities to get the jury to hear your view or see your point. Fortunately, very few of us are primarily kinesthetic learners, but it is a cardinal sin to open without using exhibits to reach the visual learners in their primary mode as well as the aural learners among us.

Draw the jurors in by forcing them to reach your conclusions by *inference* rather than by your telling them what to think. This is a little indirect, but it conditions the jurors to think for themselves. When they do so, the conclusion becomes theirs to keep, not yours. It is much more difficult to dislodge their own view in the deliberation room than it is to dislodge your view. Rather than claim the plaintiff was speeding at the time of the crash, tell the jury that the plaintiff was going at least 55, that the posted speed limit is 25, and let them make the conclusion themselves.

Use suspense to involve jurors in the dispute-solving aspects of the case. "Wait for me to ask the plaintiff what is spilled on the Member Assistance Program form, and you will know he had the time and ability to think about his actions before he decided to cut himself." Members of the jury will try to figure out the answer, some competing against each other, and all will think "Aha!" when the answer is finally revealed in testimony during trial. They will be sure to pay attention when the plaintiff takes the stand because they know the mystery will be solved once and for all.

Empower the Jury to Decide

Empower jurors to make a decision. They are expectedly nervous and uncomfortable in their new role as jurors. Show them that they can use their everyday skills to decide the case by evaluating the witnesses and analyzing the respective contentions against their everyday experience. Common sense is the benchmark against which to evaluate the respective positions of the parties.

Jurors are like everyone else. We have all used our common sense and skill to evaluate people and positions every day of our lives since we were about five years old, the age at which we discovered that people don't always tell the truth. We compare their statements and version of the events to our common everyday experience to see if what they say is reasonable, credible, and provable. We look at demeanor, consistency, and reliability. We assess these factors and make judgments. Every day. Being a juror is just doing these same things to decide for someone else instead of for ourselves.

Let the jurors know they are capable and that you will show them the facts to help them decide in your favor. Spell out the facts they can and will find, sprinkled with a little suspense, and you will hold them in their seats waiting for, you guessed it, your evidence. They are now seeing and hearing the evidence from your client's perspective. Just as you wanted.

Remember, you hold the keys, figuratively and literally. If your daughter knew how to do this, she would have *your* keys by now.