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PERSPECTIVE

## Best practices for opening and closing statements

who more accurately reflect the jury pool.

### Mind Your Manners

Lawyers often accumulate significant angst and animosity toward their opposing counsel and perhaps their opponents as well throughout the pretrial phase of litigation. Trial lawyers have to leave this at the courtroom door. Jurors will not know the history and rancor of discovery battles, hard-fought motions, and antagonism between counsel, and will view each counsel in the same way. Personal attacks will be jarring to the jurors, who will expect a respectful and decorous environment. The jury will note every reaction (and over-reaction), which will take the focus off of your arguments and the strength of your case. Leave the residue of previous bare-knuckled brawling outside the courtroom. Don't leave the jury wondering why you seem unreasonably perturbed by a small slight.

### Take a Thematic Approach

Some litigators refer to this as a book-ending your argument. Pick a theme or narrative that fits your strategy, and use your opening statement to lay out what you will present at trial. Then, be prepared to return at closing argument to pick up the narrative, and remind the jury that you have proven what you promised, pointing back to the evidentiary flags that you planted in opening. This provides structure for litigators and builds trust and credibility when you can show jurors you delivered what you promised. Use this theme as a touchstone as you present evidence during the trial, subtly reminding jurors what information is key and supports your overarching narrative.

### Don't Overpromise

Some attorneys may find themselves carried away on the passion of their own narrative. Resist the temptation to overpromise to a jury. Take a conservative approach in opening statements. You are making a first impression, yes, but you have an entire trial to win them over. You endanger your overall credibility, and leave a wide target for opposing counsel to pick at what you didn't deliver, which

can leave even what you did deliver in question, and raise doubt in the minds of jurors about what you may have left unsaid. Don't write checks in your opening statement that you can't cash in closing.

### Address the Elephant In The Room

If your case has some bad facts or evidence, preempt it with disclosure and an explanation. If you can be the first to address a weakness in your case, you take charge and defuse its danger before opposing counsel take their whack at it. What's more, you can use it as a chance to connect emotionally with the jury. By sharing the problematic elements of your case, you can build trust and common ground and demonstrate your candor. Defuse harsh judgment. Discuss the problematic elements with honesty, and tell the jurors how you will overcome them at trial. Explain how your case survives, even without a perfect fact pattern.

### Be Specific About What You Want From The Jury

Whether you choose to take the jury question by question through the verdict form in closing, or request a simple result, be prepared at both opening and closing statements with a very specific "ask" of the jury. While you may not know the exact verdict form at opening statements, you will know the elements of proof on the contested issues or claims. Lay the groundwork there and then follow through during closing. It's important here to take into account what you've sensed about the jury over the course of the trial when you deliver your ask. Resist the temptation to play to specific jurors whose loyalties you doubt. Lawyers are

notorious for putting a juror in the "win" column only to find out after the verdict that a specific juror had difficulties with the case from the start. Speak to the jury as a whole, and speak to the integrity of your case as a whole. And end with a specific request of the jury so they know what your client is seeking.

### Don't Use Technology as a Crutch

There are multiple schools of thought as to how much technology to employ when presenting a case to a jury. It can be tempting to think you are relating to "digital natives" who grew up with an app for everything if you employ some kind of technology in your presentation, even if it's just a Power-Point. But know that whenever the lights dim and jurors are focused on a screen, you run the risk they are zoning out and have lost their personal connection with you as the primary truth-teller. Avoid abusing them with long slide decks, seemingly infinite charts or by reading them an outline of your argument. Every choice at trial should be viewed through the eyes of the jury, and strategically made.

### Budget Your Time Wisely

During closing, be very mindful of your time. As you want to reserve time for rebuttal, it is important to pace your closing statement accordingly. Here is where dramatic pacing can be effective. Be ready with one important closing point of evidence, and one passionate argument, to share with the jury as your last message to them. Your final words are powerful imprints upon the jury as they enter the deliberation room.

### Conclusion

These best practices can work in all manner of cases. The effective trial lawyer will put aside much of what guides a successful pretrial strategy, and develop a strategic and informed strategy for the new and unique audience that a jury presents. ■



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Each jury, each trial, is different, and requires its own strategy and narrative. But when it comes to opening and closing statements, some tried and true standards apply. Here are some of ours, honed via many years of trial experience.

### Be Yourself

Jurors come to a courtroom with all manner of opinions about attorneys and the judicial process. Litigators must establish a relationship and build trust with the jury from the outset. The best way to do this is to be authentic. Let your personality show. Jurors won't trust you or your case if they don't feel that they can connect with and trust you. While you should still observe and respect the formal nature of the proceeding, you need not present in an overly formal way that can seem stilted and not genuine. Connect as a person, rather than appear as a courtroom apparatus.

### Keep it Simple

It is important to speak plainly to the jury, and avoid the jargon and legalese that dominates pretrial writing and oral argument. Even if some of the jurors might have some familiarity with legal terms and concepts, many times the use of overly legalistic language can be off-putting, and put space between you and the jury where you should be building bridges of common language. Try to explain concepts with simile and metaphor that are easily grasped. Don't practice your presentation solely on peers. Solicit input from non-lawyer friends and neighbors

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