Dickie McCamey
ATTORNEYS AT LAW

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The Opening Statement for the Defense

By John C. Conti
President and CEO
Dickie, McCamey & Chilcote, P.C.

Lawsuits typically proceed in three sequential phases: gathering, distilling and presenting. Gathering refers to the acquisition of the facts and data underlying the claim or defense and incorporates investigation, research, and discovery. In the distillation phase, the lawyer crafts the overall theme around which evidence will be organized and presented. This phase necessarily involves a good deal of judgment and demands a confident approach, since the honing of a central theme requires abandoning all extraneous information. In the presentation phase, the lawyer incorporates elements of theater and stagecraft, becoming the director of the play, making nuanced and detailed determinations about how each piece of evidence should be displayed and offered to the jury.

Invoking a movie-making analogy, gathering equates to storyline research; distillation is analogous to drafting the screenplay; and the presentation phase mirrors the direction of the movie itself. The opening statement in this analogy is therefore the enticing and attention-grabbing movie preview.

Defendant Seeks to Exploit Flaws in Plaintiff's Case

The opposing parties bring to bear two very different perspectives and roles that necessitate fundamentally dichotomous approaches. From the plaintiff's perspective, the objective is to take a given set of facts and shape and polish them into the most favorable configuration. In contrast, the defense's goal is to exploit the flaws and fissures in the case to bring about a fracturing, if not outright crumbling, of the edifice plaintiff is attempting to erect.

So, for example, while the plaintiff must meet the burden of proof comprising multiple elements, the defense can elect to hone in on a singular, fatal flaw—perhaps causation or perhaps a credibility question that undermines a key facet of the case and casts plaintiff in an unflattering light. An expert-report that conspicuously omits mention of an essential fact could serve as the focal point of the overall defense theme.

Plaintiff Sets the Agenda, Tone and Tenor of the Trial

The defense must be mindful that its presentation, including most prominently the opening statement, will be received by the jury against the backdrop of plaintiff's opening. This is not to say that the defense should in any sense mimic plaintiff’s style or even reference it. But the defendant should nonetheless attempt to contour his or her opening to take into consideration the tone and temperament of plaintiff's counsel.

If the plaintiff is markedly aggressive and overtly inflammatory, the defense should strive to negate or defuse the antagonistic tone, but do so in a manner that draws a positive contrast in terms of either style or theme.

Play off Plaintiff's Opening Statement if Possible

Ideally, it is most effective if the defense can begin its opening statement with a particular point that refutes the last comment made during that of the plaintiffs. Try to create the impression of a seamless transition from the end of your opponent's opening to the beginning of yours, as though you are continuing the presentation but then turning it on its head. One might say, "You know, counsel's last comment about the need to be fair minded in examining the

evidence, is something we can all agree on, in part because it illustrates the inherent unfairness in viewing evidence with the benefit of hindsight, which is precisely what they are doing."

Know Your Audience: Jury, Judge, Adversary

The well-configured, well-thought-out opening always has in mind the particular proclivities of the trial judge, the demographics and other characteristics of the jury, and the opposition's style and approach. Formulaic approaches can spoil, if not entirely undermine, an otherwise well-crafted opening, because they appear canned, akin to a politician's stump speech.

Judges bring to their courtrooms varying reputations for strictness and temperament. Be mindful and respectful of the court's approach to all facets of the trial, especially any rules or admonishments relating to openings. This is your opportunity for a first impression, and an objection by counsel, or much worse, an interruption by the court would be a grave unforced error.

Anticipate the Jury's Thoughts, Perceptions and Questions

Far too often an opening is delivered in a wooden, formalistic style—a speech rather than an implied dialogue with the jurors. It is entirely appropriate to incorporate within the defense opening remarks comments honed to juror interests, such as “you may be asking how jurors are expected to make decisions involving complex engineering issues,” or “jurors often wonder why they cannot ask questions during trial.” This will convey an important sense that you are engaged with the individual jurors and not instructing or lecturing them.

In short, jurors appreciate that you are at least attempting to be mindful of their thoughts as they sit in what is a very foreign environment. If done deferentially but without condescension, it can prove to be an effective means of guiding a jury through the issues to be considered, framed in a helpful manner.

A Defense Opening Should Stop the Momentum

In our era of instant communications, “conversation” takes place in bites and snippets, which diminishes attention spans and demands quick answers and judgments. While it makes sense for the defense to hold back some important information by way of a strategic plan, the opening must never allow jurors to misapprehend or have to guess at what the defense will be. Jurors should come away with a clear understanding that there are two credible, principled sides to the story, that plaintiffs case has certain fundamental flaws, and that it is altogether probable the case is without merit.

Despite more ancient advice to the contrary, jurors should be told at the outset precisely why you believe plaintiff's case fails; they must be shown the contradictory documents, the incriminating photos, the timelines, the “game-changing” testimony (in whatever form permitted by the court) that refutes plaintiff and undergirds your defense. The risk of a jury making up its mind early, tuning out the defense, or worse—becoming angry over what is perceived as excuse-making or a cover-up—is simply too great.

Social Media Culture Demands Concise, Compelling Responses

The substantive response to plaintiff's argument must be configured in a way that comports with characteristics of social media, being at the same time concise, factual, emphatic, and, to the extent possible, visual.

Recognizing that plaintiff will present evidence first, the defense must put before the jury two or three key pieces of evidence, compelling and graphic, that they can call to mind at any point in the trial. A text by a patient (plaintiff) to his wife while at the defendant doctor's office will never be explained away if it refutes the thrust of the malpractice suit. The challenge is to distill the defense to a small number of exhibits that the jury will be reminded of throughout the case.

Establish Credibility

It is essential that you present to the jury only those evidentiary points that you are certain are true and that you can prove to the satisfaction of any reasonable person.

Especially as a defendant, you often will have to stake out your case in just a few issues, as rarely can one credibly offer a broad array of defenses. A compelling defense argument can be eclipsed by a single overreach. Aim for the high ground, where the strongest most credible defense can be erected. And along that path, make all necessary concessions. Nothing is better received by a court or jury as evidence of candor and truthfulness.

Use Demonstrative Evidence Wisely, Combining Low Tech with High

Video animation may capture the jurors' attention, as may carefully prepared charts and graphs, but so may a common poster board with a key piece of evidence or a simple model or anatomic exhibit. Low tech—writing on poster board—provides a dramatic contrast and offers a compelling teaching opportunity.

Capturing the attention of a jury whose demographics span several decades—from the era of black and white television to large screen, high definition theater—is no mean feat. This is especially so when trial courts have such divergent views on the use of demonstrative evidence in openings. Woe unto the defendant whose presentation is at odds with the court's rules or clashes unflatteringly with plaintiff's presentation.

California's Evidence Code does not provide a specific rule or limitation on the use of demonstrative evidence in opening statements. Rather, demonstrative evidence is only restricted by the foundational limitation placed on all evidence—that evidence may be excluded at the trial court's discretion “if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.” (Evid. Code, § 352.) Even still, the threshold limitation of admissibility may not apply to certain demonstrative evidence used exclusively in the opening statement. (*See People v. Green* (1956) 47 Cal.2d 209, 215 [“Even where a map or sketch is not independently admissible in evidence it may, within the discretion of the trial court, if it fairly serves a proper purpose, be used as an aid to the opening statement.”].)

While using demonstrative evidence in opening statements is a matter of discretion for the trial court, courts have generally applied a liberal approach to such evidence. As stated by the Supreme Court, “[t]he purpose of the opening statement 'is to prepare the minds of the jury to follow the evidence and to more readily discern its materiality, force and effect,' and the use of matters which are admissible in evidence, and which are subsequently in fact received in evidence, may aid this purpose.” (*Green, supra,* 47 Cal.2d at 215, quoting *People v. Arnold* (1926) 199 Cal. 471, 486.) Demonstrative evidence used during opening statements merely provides an additional mechanism to prepare the jury for what to expect.

Be Yourself — Do Not Read

If there is any phase of the trial that should be performed largely from memory or with limited notes, it is the opening statement. Whatever might be lost by not following a script is more than made up for by the compelling nature of what is perceived as largely an extemporaneous performance. It will command the attention of the jurors while at the same time make clear that you have mastered both the underlying facts and the strategic framework of the defense.

This is achieved only through practice, and more practice, but the result will be worth it. A well-crafted single page outline can provide a more than sufficient memory-guide or “crutch.”

Do Not Fight the Battle that Plaintiff Has Invited

It is never appropriate to spend inordinate time attempting to refute the central allegations of plaintiff's case or to focus undue attention on the issues as your adversary defines them. To the contrary, the opening is an opportunity to provide perspective, context, and to otherwise demonstrate that the case, viewed more completely and objectively, represents a far different picture than portrayed by the other side.

Stated another way, the defense should change the viewpoint or context from which the jury views the evidence. Typically, providing a broader landscape casts plaintiff's argument in an entirely different light or dramatically alters the perception—*e.g.,* viewing an action through a "real time" lens rather than in hindsight.

Provide a Framework of Key Legal Principles

Regardless of the extent to which plaintiff's counsel has addressed this issue, you must set out the legal framework on which the jury will base its deliberations. It is folly to assume that the jury otherwise understands its role or the legal tools that it may use in its decisionmaking. In fact, the jury may just assume its role is simply to decide whether to award money based on nothing more than its own sense of justice. Thus, it is essential to define all key concepts, the overall structure of the trial, and the necessary elements of plaintiff's claim. And as you define the concepts, incorporate your defense strategy so that the jury understands, for example, that causation is the central theme.

Graphically Depict Key Concepts

Classically the scales of justice can be used to illustrate the role of the jury in weighing evidence or determining credibility. One might also illustrate the burden of proof in a tort case by using a drawing of a bridge, with one pier representing negligence, the opposing pier damages, and the superstructure representing causation. This is especially helpful since causation is often defined as a rather easy burden (increased risk of harm) while the implication that plaintiff must construct a bridge represents a much more formidable task.

Show Respect

The jury needs to understand that, notwithstanding your role as advocate, your actions must never be viewed as evidencing disrespect towards the parties, counsel, the court or the legal process in general.

Never be baited into an acrimonious interchange with counsel and never argue with the court. Jurors almost invariably will have a correct sense of any unfairness being visited upon you or your clients—and any lack of decorum is certain to be counterproductive. At the same time, a straightforward expression of respect for the plaintiffs and whatever injury they suffered will be well-received.

Tell Jurors What You Want Them to Do

Jurors must have a clear picture of the issues they will be called upon to decide as well as the answers you believe are compelled by the evidence.

Without exception, this requires that you, to the extent feasible, discuss in sequence each of the questions on the verdict form—capsulizing your position and respectfully requesting what answer you believe is supported by the evidence. This provides not only a guide to the issues they will have to decide, it serves as an opportunity to convey, directly or by implication, what issues are not properly part of the case.

In sum, a properly crafted opening statement puts the jury in the proper frame of mind, with the necessary understanding of procedure and the issues, to receive and evaluate evidence, and most importantly, resist any urge to reach a judgment before the appointed time.

John C. Conti is President and CEO of the Pittsburgh-based firm, Dickie, McCamey & Chilcote. He is a fellow of the American College of Trial Lawyers and specializes in the defense of healthcare providers. He is licensed in both

Pennsylvania and California.

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John C. Conti
412-392-5425
jconti@dmclaw.com