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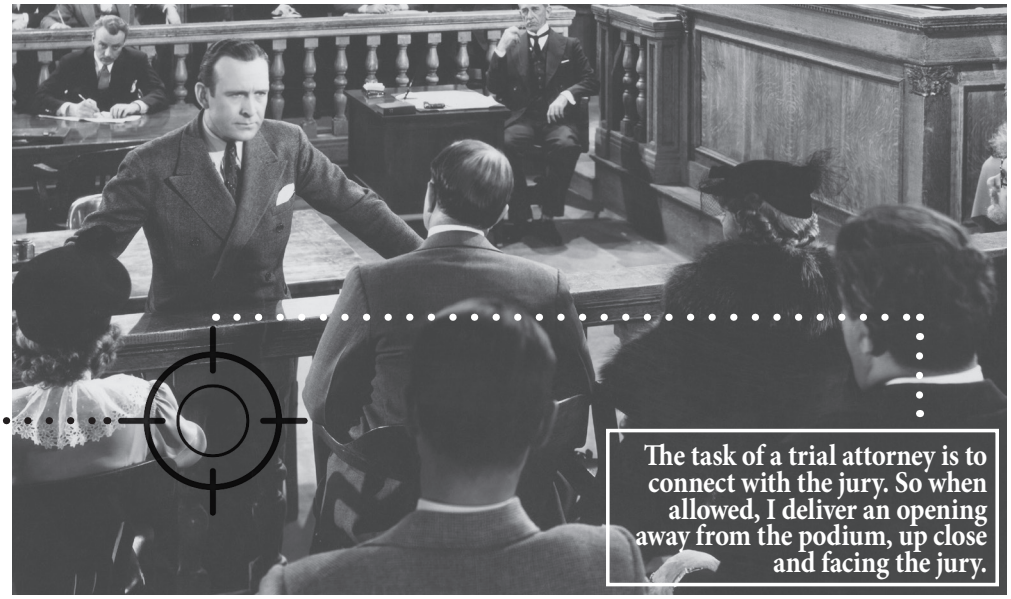
PERSPECTIVE

ART OF THE TRIAL

The opening statement



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By John Hueston

Nothing in the practice of law compares to the sheer drama of standing before a judge and jury to make a passionate and persuasive call for justice. After years of delving into arcane facts and law, it is time to decide what is truly critical for your trial narrative and to engage the hearts and minds of the jurors. It is your moment to establish a personal rapport and superior credibility with the jury. Every trial attorney has his or her preferred methods for crafting and delivering an opening. Here are a few of mine:

Harness Your Passion by Creating a Narrative Rooted in Justice and Empathy

It is fun to represent the client who appears to wear the "white hat." But most often you will be faced with challenging facts and clients with jury appeal issues. My first task upon case intake is to locate a "narrative of justice" and to begin to work to identify background, facts and personality that bring the client alive and render the client's cause sympathetic. This is important not only to show genuine passion at trial, but to motivate the team in the months if not years leading up to trial.

In *Koch v. Greenberg*, we represented a wealthy wine collector who had been swindled out of $300,000 by a wine seller who offered to repay him. The judge's first words to me were "So, why are we here? There's an offer of a refund?"

It's true that the seller, spooked by the lawsuit, had offered a refund. But Mr. Koch wanted justice, not just a return of funds. The goal was to make a billionaire who spent the kind of money on wine that most people spent on a home sympathetic to the judge and the initially skeptical New York City jury. Here are my opening lines: "This is a simple case about a seller who failed to disclose information any buyer would want to know before spending thousands of dollars … This seller knew of problems, concerns and issues with bottles in that collection; problems, concern and issues that made those bottles worthless or nearly worthless for sale. We're here because that seller didn't tell the buyer about any of those problems, issues and concerns." I didn't talk about wine, and never mentioned that my client was a billionaire. I focused on collecting and the honesty a buyer looks for in a seller. That's true whether the collector is purchasing stamps, autographed baseballs, coins books — or fine wine.

The ultimate goal is for jurors to consider your client's dilemma and conclude, "there but for the grace of God go I."

Make the Jurors Want to Join You on a Journey to Uncover the Truth

In a recent trial in Marshall, Texas, we were faced with a maximum of 11 hours to try our patent infringement trial involving cellular phone technology to a jury that included no one who possessed a college degree and one juror who had never owned a mobile phone. The judge's description of the facts of the case brought visible expressions of pain to the venire. To capture their interest and to focus their attention, we made the case about the inventor, even though he was not party to the lawsuit and had no financial interest in the case. And just as importantly, we wanted to provide a sense of excitement and discovery around the story of his invention:

"This case is about an inventor named Mathieu Martyn, and you're going to meet him here today. And this case is about his invention. And it's about the fact that LG has been using his invention and selling an estimated 40 million cellphones to date, and they haven't been paying a single penny for the use of that invention. As jurors in this case, you will have the right to require LG to pay their fair share for using Mr. Martyn's invention. And that's what we're going to ask you to do.

"The story of this invention starts with the inventor himself. You'll see him today on the stand … And you will hear that one day, while he was riding a subway train, he had his eureka moment. He can remember it to this day because it was one of those once in a lifetime things where he realized he was on to something groundbreaking."

Everyone on the jury was focused and waiting to hear about that "once in a lifetime moment."

Thin to Win: Leave Most of Your Pretrial Theories and Evidence Behind

Most of the creative thinking and your debates with colleagues and clients should focus on what evidence, theories and themes to include in the opening and thus the rest of the case. After years of working at every level of the case, each team

member will have their favorites. Now is the hard part: tough consensus calls on what to cut. From your single trial narrative, choose the fewest witnesses possible and only the "hottest" documents to establish your case. You are battling the limited attention span of the jury who will bored of repetitious or seemingly unrelated testimony and will begin anxiously awaiting the cross. I have yet to hear jurors post-trial state that they were prepared to vote for a particular outcome but did not because they did not see a third, fourth or fifth piece of corroborating evidence.

Be Your Own Worst Enemy

I prepare for my opening statement as soon as the judge sets a trial date. That's when I examine the case as if I were the lawyer for the other side. This is not an imaginary exercise; if I am the plaintiff's counsel, I craft a defense. If I am defense counsel, I craft the attack. This means being honest about the other side's best arguments, strongest evidence, unimpeachable witnesses. With a clear sense of both side's strengths and weaknesses, I begin writing my opening statement. I then drop the notes, practice it aloud the night before trial, memorize key highlights, then go to sleep. Early the next morning I run a few miles. Then I'm ready.

After years of delving into arcane facts and law, it is time to decide what is truly critical for your trial narrative and to engage the hearts and minds of the jurors.

Ladies and Gentlemen…

The task of a trial attorney is to connect with the jury. So when allowed, I deliver an opening away from the podium, up close and facing the jury. If local rules call for you to stay near the podium, step one arms-length away so that you don't appear to be hiding behind it. I also use this time to read the jury and its body language. Unless you are involved in a criminal case, jurors are not likely to gasp, weep or faint (as happened recently during an Iowa murder case when graphic autopsy photos were shown). But I do look for little nods, raised eye brows, or the tell-tale crossed arms. See how well you are connecting and on what points.

Never Read Your Opening Statement

When I first trained trial lawyers at the U.S. attorney's office, I promised my young attorneys that if I ever caught them reading an opening statement in court, I would walk up and pull away their notes (it happened once; the attorney stumbled for a moment and then improved). The decision to read your opening is a decision to forego a personal connection with your jury. And your written work has a metric and cadence distinct from a natural verbal communication. Better to forget some words, appear human and make a genuine connection than to read a rehearsed statement.

Do Not Exaggerate

The old adage, "trials are won or lost in opening statements" is generally not true. Trials have twists and turns, setbacks and surprises. What is true about opening statements, however, is that they lay the foundation for your relationship with the jury. The one exception where cases are lost in opening comes when the presenting lawyer is caught in a lie or gross exaggeration. When I listen to opposing counsel's opening, I wait for key words and phrases such as "never," "always," "not a single," or "absolutely." When I hear those, the chase is on. All I need to find is *one* occurrence, one instance, one piece of evidence that contradicts those absolutes, and the other side has broken faith with the jury.

The defense for Kenneth Lay in the Enron trial opening statement did just that: "This case will rise or fall on whether Mr. Lay voluntarily sold even one share of Enron stock." Even though it was not an insider trading case (and thus an unnecessary overstatement), the new primary objective of my cross of Lay was to prove that he had, in fact, freely sold many shares of Enron stock. When that was accomplished, I sensed that the case was over.

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