



A mind is a terrible thing to change

THE REAL EFFECT OF OPENING STATEMENTS

You've heard it a million times, "opening statement is where you win the trial." Countless articles and seminar presentations have referred to "studies" showing that 80% of jurors make up their minds after hearing the opening statements. When examined closely, though, only one socio-legal research study is cited and relied upon: considered the landmark study of the judicial process, *The American Jury*, by Harry Kalven, Jr. and Hans Zeisel, originated in 1966 and has been cited in over 1,000 publications and twenty-five U.S. Supreme Court cases.

But is it true that juries make up their mind after opening statements and never change afterwards? The answer is – *it's complicated*.

Zeisel followed up the infamous and often misquoted study with a paper called *A Jury Hoax: The Superpower of the Opening Statement* 14 Litig. 17 (1987-1988.) Misquoted? Yes. In that paper, Zeisel attempted to put an end to the 80% hoax. Zeisel made it clear that he and Kalven never came to the 80% conclusion in their study simply because they never asked the question – no data was ever collected to support a conclusion that jurors make their decisions after opening statements. In addition, nowhere in *The American Jury's* 438 pages do the words "opening statement" even appear.

Other articles and studies have pointed out the 80% fallacy. In *Fact or Fiction: The Effect of the Opening Statement*, 18 J. Contemp. L. 195 (1992), William L. Burke, Ronald L. Poulson, and Michael J. Brondino concluded that jurors do not make up their minds in opening statements before they've heard the evidence and state that this misinformation is incorrectly attributed to *The American Jury* research. They confirm that the true finding was "the real decision is often made before deliberation begins."

While *The American Jury* may not have concluded that jurors make up their minds at opening statements, there is some truth to that assertion – with a caveat. Matthew Yglesias once said, "A mind is a terrible thing to change." Sure, he was talking about politics, but that little quote can be quickly analogized to persuading a jury. We have to remember that jurors are just like everybody else. In a world of insta, snap, tweet, *etc.*, we are all in a hurry to make sense of things. In general, people prefer and defend their understanding of the world – right or wrong.

The first thoughts someone has about a subject usually constitute what they believe. Often jurors will make a snap judgment after opening statements and spend the rest of the trial seeing whether the evidence fits it. That is not to say that jurors realize their minds are made up, but rather that they have made crucial decisions about credibility and positions that determine how they interpret the forthcoming evidence and ultimately how they make decisions. Even Zeisel agreed that a "jury's tentative verdict wasn't based on the promise of superior evidence but a promise then kept in the subsequent trial." Jurors will render a verdict in accord with their initial impression *if* the trial plays out according to the opening statement.

So, the critical issue becomes delivering what is promised in opening. Never assume that a juror will keep an open mind about your case during the entire course of the trial. In trial, as in life, you only get one chance to make a good first impression. Your window of opportunity to persuade jurors is shorter than you think. It is certainly true that, if your opening statement is terrible, or if you tell the jury you are going to prove things that you cannot and do not, you will lose credibility and possibly the trial. Therefore, the time provided for opening statement should not be wasted.

Start strong. Your purpose should be to persuade and gain credibility from the beginning.

So how do you get the jurors on your side by the time you sit down after your opening?

You had me at "hello"

You have to "hook" the jury at hello.

The key to a "winning" opening is a compelling and coherent narrative built around a simple, engaging, and compelling presentation of the theme of your case. Think of an opening statement as the jury's itinerary to the verdict. It is the axis around which trial revolves through direct, cross, and closing. As a preview of the case, opening statement is an opportunity for you to show the jury what will be proved, how it will be proved, and why. The statement is a union of storytelling and non-argumentative salesmanship to condition and predispose the jury to the evidence. Remember, the goal is to craft a lens through which the jury will see the evidence that provides the jurors with a view of what happened that leads to your desired outcome – justice for your client. The details matter less; the story is all.

You may have a great story, but if no one is listening, it will not matter. In presenting an opening statement, your job is to hook people into listening to your story. From the moment you rise to give your opening statement, launch into your story. Do not waste time gushing with thankfulness about jury service, introducing yourself, telling them that jury duty is a special privilege, etc. The jurors will never have their attention focused on you as closely as when you step up for the first time to tell your story. Do not waste that opportunity.

There is no "one size fits all" to opening statements, but three elements

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can help you win the jury and get a jury to wear your team colors from the beginning:

- Power statement that summarizes the themes and theory of the case;
- A visual story of what happened; Power ending that brings together the themes, theory, and the story.

The contents of these elements and how they are arranged within the opening statement will depend on the type of case.

Power statement

In *No Time to Waste*, James W. McElhaney theorized “The Golden Moment” is the first 30 seconds you have when you begin to speak on any subject in a trial, when you have everyone’s undivided attention, and a chance to make a real impact or impression on the jury. McElhaney applies this concept to every aspect of trial: from jury selection to opening statement, direct examination, cross, and final summation. The “golden moment” is the first 30 seconds.

Therefore, the very first words you utter in opening should have “power.” The power statement should make an impact and summarize the theory and themes of the case in one or two paragraphs or sometimes one or two sentences. The beginning of your opening needs to provide the jury with a compelling reason to set aside all competing thoughts and give you their full attention for the duration of your opening statement. Ideally, you can evoke an image in a juror’s mind, grab the jury’s attention, and pique their curiosity because they know little to nothing about your case at that point. The goal is to make them want to hear more and focus them on the theory and themes of your case immediately. Do not waste the “golden moment.”

The power statement will capture the essence of the case and set the tone of suspense for the story. It is appropriate to deliver an emotional power statement when you are trying to captivate the jury’s attention. But, that does not mean argument, or being loud and animated. It should be woven in imagery that compels the jury to identify with the drama. The emotion is generated through stories and analogies – create emotion during

opening with *detail*. Simple detail makes the jury see the story, live it, and feel it. For example:

There’s a park here in town. And it’s like most of the parks, rolling hills and tall trees. But you see very few people there. Children are not out playing. Couples are not strolling hand-in-hand. There are no games being played on the grass. Adam Smith will tell you this. He drives by that park every day, to and from work. That park is called Eternal Valley Memorial Park. His wife, Stacy Smith, was buried there 35 years too soon. We are here today to determine how and why, who is responsible, who must compensate, and how much is owed. You will come to know Stacy Smith. She lives in that park where no one plays, where no one ever hears laughter, simply because Richard Stratton drove over her in the safety zone of the cross walk.

These are effective ways to establish a lasting effect on the jury. There was nothing overly dramatic or animated about this power statement. What made it emotional was the detail. The power statement will fail if you attempt to be too dramatic, caustic, or, on the other side of the spectrum, corny or cute. Your word usage should be authentic to your personality and style.

At this point, you have the jury’s attention, but to keep it, you must provide context and give a little more detail about a critical moment in the case – one that if understood in any other way may cause you to end up with a second-place finish. You should tie it in to your power statement, if possible.

These stories are persuasive and become embedded in a juror’s mind when they make sense, are stated in plain language, and have a beginning, middle, and an end.

Tell the story

Now that you have the jurors on the edge of their seats, wanting to hear more, show them what happened. This is the time to be a good storyteller, not a mere reciter of the facts. You will lose the impact of the power statement if you then slide into a witness-by-witness summary. Nobody wants to be lectured to, sold something, or interjected into an

argument. But people love stories. Bring your client’s story to life in a way ordinary people will understand. Make memories that the jury will not forget. Give them imagery and action. The story should contain the who, what, when, where, why, and how of the incident, the injury, and of the damages. The point is to make the jury become “eyewitnesses” to your case.

McElhaney emphasizes, “painting a vivid word picture is one of the most important trial techniques a lawyer can learn.” The idea of bringing facts to life can be done by adding a few key elements to your opening:

- A setting in time and place.
- A touch of humanity.
- Some familiar details of reality.
- Simple, disarming language.
- Words of visualization.
- An event of magnitude or importance.
- No argument or “persuasive” characterization. The point is to show, not tell.

Remember, as you are telling the story, personalize your client. Bring the jury into your client’s living room, *figuratively*, and present the client to the jury in a way that allows the jury to understand their humanity. They tell the story of what happened. They tell the story of what brought this case to the courthouse. They tell the story of an injustice – a story that makes the jurors feel, “What happened to this client was wrong. We have a chance to correct it with our verdict.”

A brief example on liability:

Many of you may be familiar with North Ventura Avenue running between Canada Larga Road and Crooked Palm Road. It’s a two-lane road, mostly flat and straight. The speed limit is 45. This incident happened on the road at about four o’clock in the afternoon on April 3, four years ago. It was a clear spring day. Even now, Louisa doesn’t remember much of the accident. She remembers leaving for work at Bernadette Botanicals where she has worked for over 15 years. She also remembers taking North Ventura Avenue back to her home in Ventura as she did every weekday. There was no warning before the

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crash. The defendant crossed the centerline and hit Louisa head-on. That's all she can tell you. There are no eyewitnesses.

But you will hear from Officer Stone of the Ventura County Sheriff's Department. He will tell you that when he got to the scene of the wreck, what was left of the defendant's car was wedged into Louisa's driver side door. Her car and the defendant's car were on her side of the road. And Officer Stone will tell you that in defendant's car he found a six pack of beer. The defendant had been drinking, was drunk, and was driving.

An example on damages:

Ruth sets her alarm every morning two hours before she needs to leave for work. When the alarm sounds, she reaches for her pain medication. She sits at the edge of the bed and takes a deep breath as she lowers her left leg off the bed first. She feels the cold floor against her left foot. Ruth takes another breath and holds it as she tries to stand up gently placing her right leg on the floor. She can't feel the cold floor. Ruth then slowly makes her way to the bathroom, dragging her right leg behind her. She brushes her teeth and combs her hair. Ruth uses the toilet like a seat so that she can get dressed. She has a whole setup in the bathroom with a makeshift closet to get ready without much more of a struggle. It takes Ruth about an hour to get ready in the morning, just enough time for the medication to take effect before she even gathers the strength to venture to the kitchen to fix herself a cup of coffee. This is Ruth's life now, through no fault of her own.

There are many nuances to presenting your client's story that include the defendant's bad conduct. The quintessential claim in a personal injury case is that the case is intended to make the plaintiff whole. In our society we are all expected to follow the rules (laws). This is necessary to maintain a civil, safe, and deferential populace. We are also expected to be responsible for the consequences when we break those rules. Therefore, it is important that the jury understands during opening statement that the defendant failed to follow the rules everyone

else is expected to follow, and as a result, the plaintiff was hurt.

Power ending

Just like the power statement is designed to invoke the psychological principle of "primacy" (that people tend to be influenced by what they heard first), the conclusion to an opening statement is designed to invoke the psychological principle of "recency" (that people tend to remember best what they've heard last). A memorable conclusion brings together the theory, themes, and story of what happened in a memorable ending. For example:

Now, as I said in the beginning, the City is going to jump up and down and tell you, "The City is so big we cannot possibly be held responsible for every broken sidewalk in the city. We don't have the manpower. We don't have the money." But the evidence is going to show you that from 2010 to 2012, the time period where they had to fix this sidewalk so that Abel wouldn't get injured and his life forever altered, the Bureau of Street Services responsible for the sidewalks returned to the City \$21 million in unused funds from their budget. That's \$21 million they could have spent to fix that sidewalk, Abel would still be working and enjoying bike rides with his young nephew, and you all wouldn't be here right before Christmas. Now I'm going to sit down, and I'm going to let Mr. Stevens, the attorney for the City explain that away.

Remember, jurors have limited attention spans. Their ability to retain what is said would be adversely affected by trying to fit in every detail and fact. It is often best to say less. Capture the jurors' mind and hearts: don't overwhelm them with unnecessary details.

Show me the money

There are different schools of thought regarding telling jurors in opening how much of a money verdict, or the range of a verdict, you will ask for in the end. It is hard during opening statement to face the jurors, look them in the eye, and say, "My client wants eight million

dollars for what happened to her." But if you have a case with big damages and you expect to ask for over a million dollars in closing and know that the amount will be justified by the evidence and law, then it is critical in opening statement. Put your big girl/boy pants on and step up to the plate. Do not allow defense to make you or your client look greedy.

Be cautious, however. Do not overuse the word "million." Only use it once in opening. It will sting the juror's ears. Talking about "million dollars" captures attention immediately. But saying it over and over again loses the impact and punch that it is meant to have. Say it once, with conviction and authority. Do not apologize for needing money to make your client whole again.

Conclusion

Do not forget that "a mind is a terrible thing to change." You want the jurors on your side when you sit down after your opening; the snap judgment about the case to be in your client's favor. You want the defense fighting the entire trial to change their minds. You want every witness's testimony and every piece of evidence admitted to simply fortify the juror's initial position after your opening. Remember that in your opening, you essentially made a promise of what the case was about and what the evidence was going to show. Keep that promise and the jurors will be fighting in the jury room to correct the injustice thrustled upon your client by the defendant.

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