Obstacles to Persuasion in Opening Statements

Jeremy Rose and Susan Macpherson
National Jury Project-Midwest

Justice is blind, the saying goes. Unfortunately, jury trials are set up in such a way that the attorneys must "drive blindfolded," unaware of what the jurors think of their case until it is too late. Nonverbal feedback from jurors is notoriously unreliable and deceptive, and the restrictions on juror-to-attorney communication make it exceedingly difficult to ascertain which persuasive strategies are working on the jury and which are not. However, decades of social science research on persuasion illuminate what helps or hinders the process of persuading a jury.

"HIT 'EM WHERE THEY LIVE"

The first thing to keep in mind is that your arguments should appeal to what your audience already finds meaningful. To put it another way, it is much more effective to work with the thoughts, beliefs, attitudes, and values already in the jurors' heads than to try to implant new ones. Many attorneys may think their role is to convince jurors of things the jurors did not formerly believe, but this is the least effective way to persuade. It works much better to tap into beliefs and attitudes the jurors already hold.

This may suggest a certain pessimism: What if your jurors hold the "wrong" attitudes and beliefs? Are you doomed? Not necessarily. Keep this in mind: There are many ways to argue a case, and many different appeals that work on less-than-ideal jurors. With that principle in mind, voir dire takes on an additional purpose, beyond just the intelligent use of peremptory strikes: It is a way to discover ways to appeal to your audience, to find out "where they live" so you can reach them there.

Another principle to remember is that your listeners will always have an internal dialogue running through their heads as you are talking to them. When you give a speech, the audience members are simultaneously making up their own speech– sometimes a more interesting speech than yours– and delivering it to themselves. If the theme of a juror's internal speech is, "That speaker is wrong, and here's why . . ." then you have lost your ability to persuade that juror. If instead the internal speech says, "You know, that's right, and here's another example to support that point," then true persuasion has taken place. In that way, all persuasion is self persuasion[1]: It ultimately doesn't matter what you say to your listeners; it matters what they say to themselves about your arguments. In a jury context, it also matters what they say to each other. After all, the verdict is reached in the jury room, not the courtroom, so the most crucial arguments are not the arguments you make to the jurors but those they make to each other.

How do you, as the attorney, persuade the jurors in such a way that they persuade each other to decide in your favor? Nearly 50 years ago, researchers at Yale identified the five steps in the persuasion process: attention, comprehension, acceptance, retention, and action.[2] You must have the jurors' attention, they must understand your message, they must accept or agree with it, remember it, and act on it in the desired fashion in deliberations. How do these factors play out on a practical level in preparing an opening?

ATTENTION

Probably the worst assumption a speaker can make is that he or she has the audience's complete and undivided attention at all times. This is simply not the way the human brain works. Attention is a fickle, wandering thing, reined in by biological constraints, emotional reactions, cognitive limitations, and distractions. Although it is a hard truth to swallow, the fact remains that *jurors don't have to listen.* And thanks to skills that most people learned in high school, you cannot easily tell if they are listening.

You can, of course, hope that they are listening, and most jurors take their job seriously enough that they try hard to listen. But keep in mind the factors that make listening difficult:

Attention Span Limitations: Human beings have difficulty paying attention to a speaker after 45 minutes. This is a basic biological limitation. An opening statement longer than this will lose some of the jurors simply due to mental fatigue. Even within that time frame, the human brain takes many brief excursions or "brain breaks." As a result, an attorney should organize the opening in such a way that the jurors can get back on track when attention wanders. Telling the jurors when you are changing topics and where you are heading next allows them to tune back in. Case themes should be repeated often. Although redundancy throughout the trial is a frequent complaint of jurors, a little repetition in the opening can be very helpful. Tell the story twice– once briefly– once in more detail.

Failure to comprehend language and concepts: What does a five-year-old do when she hears grownups using words she can't understand? She tunes out. Adults are really no different. They may try harder to follow concepts that are foreign to them or words they don't recognize, but it will be an uphill battle. More on this below.

Failure to understand relevance: The tendency to tune out is even stronger if the jurors don't grasp the relevance of what they are hearing. Jurors are at a disadvantage at the outset of the trial. They are struggling to understand what is happening, what relevance it has, what the rules of the game are, and what they are supposed to do with the information they hear.

The following is a good structure for opening statements in most medical negligence cases. This may not be the most effective order of topics for all cases, but all of these topics should be covered. The primary objective is to build the story slowly – layering the details in a methodical fashion – so that the jurors are better able to absorb and retain what the case is about. Repetitive use of the themes improves retention by strengthening the overall framework.

A. Major Case Themes

The overview tells what happened and the result using the major themes.

B. Frame the Dispute: Why Are We in Court? Who Is Being Sued and Why?

A brief nontechnical explanation of why the defendants were negligent. The goal is to define each defendant's major violation so jurors know what it is the plaintiff has to prove in order to win. Use your theme for each defendant.

C. What Was Supposed to Happen? Describe Standard of Care

Explain what was supposed to happen and why in lay language. Use visual support to reinforce the standards and to show the causal relationships. Only introduce the medical terms that are related to the major events or key issues in dispute. Introduce them in chronological order so that to some extent you are again telling the story of what happened.

D. Tell the Story of Negligence

Not every detail – just the details that most strongly support the conclusion of negligence. Integrate your problems into this rendition. Don't shy away from acknowledging unfavorable facts, but frame them in a way that reduces or minimizes significance. Be sure to repeat your major themes.

E. What's Wrong with the Main Defense Arguments?

Frame the defense arguments in the way that works best for you, but be careful not to appear to be distorting the arguments. Otherwise, the inoculation will be ineffective. End with a visual that simplifies your counter arguments so jurors have a better chance of remembering them.

F. Preview Compensation Issues

How you frame key compensation issues depends on the case, e.g., is life expectancy a critical point of dispute? Is home vs. institutional care the main issue? Alert jurors to what they will have to decide, and preview the tools you will provide to help them.

G. Sum up by Putting Your Themes into the Legal Framework of Medical Negligence

End up by defining what the jurors will have to decide on liability – almost a repetition of the first "big picture" segment, but tied into the law.

Human beings need conceptual frameworks for storing and interpreting information, and without a conceptual framework, individual pieces of information are useless. Once the framework is established, listeners know what to do with new information. It can be more easily assimilated and digested, and its significance is clearer. Remember that there are two kinds of information: framework information and detail. Without the former, the latter is meaningless. If you are effective at conveying to the jurors "what this case is all about," you are three-quarters of the way home. If the jurors don't have a clear framework for the case before you get into the testimony, they are much less likely to be persuaded.

Mismatched learning styles: A great deal has been written about the fact that when it comes to learning, people fall into one of three camps: Visual, Auditory, and Kinesthetic. Trial attorneys are often alarmed by the fact that auditory is the primary learning mode for only a small percentage of the population. Many attorneys now rely on PowerPoint to capture the visual learners. But the solution is not to reduce your entire opening to PowerPoint bullets. That only results in you and the screen battling for the jurors' attention. Jurors who have been required to sit though slide after slide of "bullet points" at work may quickly tune out.[3]

By using a **variety** of visual aids such as charts, models, and demonstrations, as well as making selective use of PowerPoint for emphasis or reinforcement, you will hold the attention of visual learners. Kinesthetic jurors need to hold the records, feel models, or "walk through" the diagnostic process.

Although attorneys often feel that the medical records are the main visual element jurors need to see, it is important to consider whether other information might be equally important. For example, the layout of the hospital floor or ICU may vary significantly from what the jurors would picture left to their own devices. In a case based on the failure to monitor and promptly respond to symptoms, we learned in jury research that the assumptions jurors were making about sight lines, distance, and even layout of all the beds in the unit had a critical impact on their views about negligence. When we did not provide visuals, the visual learners on the jury created their own mental pictures, and we lost control of the "evidence" they used to decide the case.

Careful attention in voir dire will usually reveal the processing modes of the jurors. When the jurors tell you about themselves, do they use visual, auditory or kinesthetic language? By that point, it is too late to redesign the visual aids for your opening, but you can make last minute adjustments to your language in order to fit the learning styles of jurors who are seated.

Distraction: Finally, nothing can make it more difficult for an audience to listen than a crooked pair of glasses, a loud tie, a bad haircut, a persistent sniff, or any of a thousand potential distractions. The most basic rule for getting jurors' attention is a very simple one: "Don't distract from your message."

COMPREHENSION

If the jurors can't understand the information you are giving them, they won't be persuaded by it, and in complex medical cases, there is obviously a greater risk that the attorneys will be speaking a language the jurors can't follow. Years ago a trial consultant named Joe Guastefero remarked that attorneys must learn to speak two languages - "legalese" to the court and to each other, and regular English to the jurors. Attorneys who specialize in litigating medical negligence cases are tri-lingual. Being fluent in the language of medicine is an essential skill for going head-to-head with an opposing medical expert during a deposition. The ability to use shorthand references to complex medical concepts gives attorneys power and authority in dealing with opponents. But in the opening, it can easily become a barrier to persuasion.

While the need to switch to plain English when talking to jurors is obvious, many attorneys find it difficult to do so. Some of the resistance undoubtedly comes from discomfort. When you hear yourself say, *"cutting off the air and blood supply caused injury,"* or *"swelling of the brain"* it may well feel like the **right** words to use are "hypoxic ischemia," and "cerebral edema." When you don't say *"the differential,"* but rather *"the list of diagnoses that have to be rules out,"* the latter sounds almost awkward, and certainly unsophisticated. As a result, what starts out to be a plain English opening may inadvertently slip into medical language.

Some attorneys assume that defining a medical term one time makes it part of the jurors' vocabulary. If you have talked to many jurors after medical negligence trials, you have most likely learned that this is a dangerous assumption. Jurors often have difficulty correctly using medical terms after weeks of trial. While the opening is a good opportunity to introduce a few of the most important medical terms jurors will hear in testimony, most jurors are only able to retain a limited amount of new information under the stressful conditions in which the opening is delivered. The one disadvantage that the plaintiff has by going first is that most jurors are still experiencing some anxiety about their new task and their unattended obligations outside of the courtroom.

Anxiety puts a significant limit on jurors' ability to learn, and certainly isn't conducive to learning a second language. Think for a moment about how you react when you are traveling in a foreign country. If you are unfamiliar with the language when you read signs on the subway, you don't just glance at the sign and instantly incorporate that input as you would ordinarily do. Instead, you have to slow down and process the directions with an internal dialogue: *Ok, the sign says **venstre** and that means left, and that goes **syd** which means south, and I go south to get to . . ."* etc. That same internal dialogue goes on for most jurors when you give the term "hypoxia" a one sentence definition early in the opening and then use it again later on at a crucial point in your story. While you are making a key point on causation, the juror's internal dialogue may be: *"Oh **hypoxia**, ok let's see. . . He told us what that meant earlier. Was that about the blood or breathing? It sounds important – so – let's see hyper means too much so hypo must mean not enough, so it's not enough of something . . . I wonder what?"* Your key point may be relegated to background noise while the juror completes this internal dialog.

The recommendation to avoid relying on medical language in the opening has nothing to do with jurors' lack of intellect. Most jurors are quite capable of understanding the definitions and concepts introduced in the typical opening of a medical negligence case; they just

shouldn't be expected to internalize all of that new information in 45 minutes. Learning to use new information and getting comfortable with it, takes more time.

Rather than assuming jurors have learned the medical terms you've defined, a more realistic approach is to assume the jurors will need the definition repeated if the new terms have to be used at critical points in your story, and to stick to plain English as much as possible. That way the jurors can give their full attention to how you are **framing** the dispute rather than being distracted by the need to do their own simultaneous translations. Since the opportunity to frame the dispute is the ultimate goal of any opening, it makes sense to eliminate anything that reduces or interferes with your ability to achieve that goal.

ACCEPTANCE

Obviously, one of the most important steps in the process of persuasion is for the jurors to accept what you are saying. The basic principle to keep in mind is that acceptance is a process of matching expectations. If what you say to a jury matches ideas that are already in the jurors' minds, they will accept it. Conversely, this means that juries do not accept what you say simply because you are eloquent, because you are logical, because you have proof, or because they like you. Instead, jurors use their own life experiences and previously held beliefs to judge the acceptability of what you say.

Many medical negligence cases hinge on what the jurors consider reasonable, and how you tell the story, especially in the opening statement, can have a significant impact on what the jurors consider reasonable. Because the current debate over the impact of medical negligence cases has encouraged many jurors to be more skeptical about what the plaintiff's attorney says a reasonable doctor or nurse would have done in the context of a specific case, this aspect of the opening is particularly important. The temptation is to provide more detail on your experts and on everything they have to say. But trial simulations, as well as post trial interviews, reveal that it is usually more effective to boil down the standard of care to simple rules that can be described in plain English.

For example, a standard of care could be described as follows: *"The anesthesiologist must foresee that a patient with known risk factors for post-operative respiratory compromise, who has already demonstrated signs and symptoms of respiratory compromise in the PACU, is at risk for continued respiratory compromise and possible respiratory arrest until the effects of anesthesia and morphine have worn off."* But, if you boil it down further, the underlying logic and thus the reasonableness of the standard is going to be clearer: *"The anesthesiologist knows that a patient with multiple risk factors and symptoms of respiratory problems after surgery is at increased risk for continued respiratory problems and possible respiratory failure until the effects of anesthesia and morphine have completely worn off."* Bear in mind that even when stated simply, the number of standards that are at issue still increase or decrease case complexity. Many cases can be simplified by limiting the violations to those which have the strongest causation evidence.

RETENTION

It is easy to forget that the case you have worked on for several years is all brand new to the jurors. It is a difficult task for them to remember all the evidence in an opening statement even if it is under one hour. The most important decision to make in preparing the final draft of an opening in a complex case is this: What are the three most fundamental aspects of the case? By deciding among all the possible arguments the three things jurors absolutely have to grasp and accept in order to find negligence, you will not only determine how to cut your opening to a more manageable length, you will also enhance retention.

Using the "rule of threes" is an important tool for helping jurors remember your case. By now this rule is familiar to everyone as a memory aid. But it also serves another important function. Salespeople are taught to only offer the customer three choices because offering more than three overwhelms the customer. Attorneys should strive to have three main points for the same reason. For a case in which the doctor made 18 different mistakes in delivering a baby, clump these mistakes into groups of three (such as inadequate record-keeping, failure to get the proper test, and delayed reaction). Jurors can remember more information if it is well-organized, and the best way to organize is in three categories.

Some nervous attorneys take the approach of "throwing everything at the wall and seeing what sticks," hoping that somewhere in the mountain of information and arguments presented the jurors will find something convincing or memorable. But keep in mind is that it is not much fun being the wall, and the jurors resent it. Worse, the facts or arguments that might have been the key to winning the case are buried in the heap, and the jurors may just as easily choose to focus on peripheral issues or minor facts. Ultimately, by giving jurors too much information you lose control over what they retain.

In the old days, eloquence was valued, and the golden-tongued speaker could sway an audience. In these less literate times, eloquence can actually backfire. If a juror was transfixed by your fancy terminology and intricate arguments, he or she may end up admiring you but not remembering what you said. When that same juror is in deliberations, and the hostile juror across the table says, *"Well I wasn't convinced at all; tell me your arguments!"* the juror who was so taken with your eloquence can now only sputter about what a good speaker you were. If the juror can't recreate your arguments or recall those polysyllabic words you were using, you've just lost your best advocate.

ACTION

The purpose of a presenting a persuasive opening is not only to get the jury oriented in your favor, but also to arm them against the persuasive power of your opponents' arguments. This is so straightforward that there seems to be nothing more to say about it. As with all the other steps in the persuasion process, however, there are potential complications. The most effective technique for undercutting the impact of your opponents' opening is to identify their strongest arguments and focus on the main reason each argument doesn't hold up or doesn't matter. There may be five or six reasons why the opposing arguments are wrong, but trying to discuss all of them will reduce the jurors' ability to remember your critique while they are listening to the defense.

It is easy to make the mistake of distorting your opponents arguments beyond recognition. Obvious exaggeration will not only hurt your credibility, it will also trigger some counter-arguing by the jurors, e.g., *"Nobody would say anything that foolish. The hospital must be trying to argue that . . ."* The easier it is for jurors to recognize the opposing arguments you set up in your opening, the better prepared they will be to take action, i.e., employ the critique you provided. This is not to suggest that the opposing arguments be stated exactly as defense counsel would present them. The opportunity to **frame** the opposing arguments is an important advantage. For example, before you discuss them, the defense arguments may be framed as "assumptions," "shifting responsibility," "finger pointing," or "everyone says it is not my job," in a case with multiple defendants.

Finally, remember that jurors always have concerns about the effect of their verdict. If it is a wrongful death case, will awarding the survivors money do any good? If the defendant is the only hospital in a small town, will a significant verdict have any negative affects? The last step in the persuasion process, the researchers say, is to remind your audience of what good will come if they follow your recommended action– or what harm will come if they don't. Everyone wants the world to be a better place, so your final task is to convince the jury that your client will help accomplish that goal.

End Notes

1. Herbert W. Simons, *Persuasion and attitude change*, in L. L. Barker & R. J. Kibler (Eds.), Speech Communication Behavior: Perspectives and Principles (Englewood Cliffs, NJ: Prentice-Hall, 1971, pp. 227-248).

2. Hovland, Janis, and Kelley, *Communication and Persuasion* (New Haven, CT: Yale University Press, 1953).

3. See Edward R. Tufte's The Cognitive Style of PowerPoint (2003) for a wonderful treatise on the dangers of relying on PowerPoint bullets to convey information.