

Five steps to persuasion in opening statements

Research in the social sciences has revealed practical ways to introduce your case to jurors and help them remember your evidence, themes, and arguments when they get to the jury room.

SUSAN MACPHERSON AND JEREMY ROSE

Justice is blind, as the saying goes. Unfortunately, jury trials are set up in such a way that plaintiff attorneys must work as if blind, unaware of what jurors think of their case until it is too late. Nonverbal feedback from jurors is notoriously unreliable and deceptive, and restrictions on juror-to-attorney communication make it exceedingly difficult to ascertain which persuasive strategies are working. However, decades of social science research illuminate what helps or hinders persuasion in the opening statement.

Your opening should appeal to what your audience already finds meaningful. 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.

What if your jurors hold the "wrong" attitudes and beliefs? Are you doomed? Not necessarily. There are many ways to argue a case, and different appeals work on less-than-ideal jurors. This gives voir dire an additional purpose, beyond just

the intelligent use of peremptory strikes: In jury selection, you can discover ways to appeal to your audience, to find out "where they live" so you can reach them there.

An important 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 speak, 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 . . .," 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," true persuasion has taken place.

In that way, all persuasion is self-persuasion¹: 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 plaintiff attorney, craft your opening statement so that jurors persuade each other to decide in your client's favor? About 50 years ago, researchers at Yale University identified five steps in the persuasion process: attention, comprehension, acceptance, retention, and action.² You must have the jurors' attention, they must understand your message, and they must accept or agree with it, remember it, and then act on it in the desired way in deliberations.

Attention

Probably the worst assumption a speaker can make is that he or she has the audience's complete 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.

Most jurors take their job seriously enough that they try hard to listen. But keep in mind the following factors that affect how jurors hear you.

Attention span. 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 due simply to mental fatigue.

Even within that time frame, the human brain takes many brief excursions or “brain breaks.” As a result, you should organize your opening in such a way that the jurors can get back on track when their attention wanders. Telling them when you are changing topics and where you are heading next allows them to tune back in.

Repeat case themes often. Although redundancy throughout the trial is a common juror complaint, a little repetition in the opening can be helpful. Tell the story twice—once briefly and once in more detail.

Language and concepts. What do five-year-olds do when they hear grown-ups use words the kids don’t understand? They tune out. Adults are 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.

Learning styles. When it comes to learning, people fall into one of three camps: visual, auditory, and kinesthetic. Trial attorneys are often surprised to discover that auditory learners make up 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; if you do, you and the screen will compete for the jurors’ attention. Some jurors may have an instantly negative reaction to PowerPoint presentations if they have been required to sit through slide after slide of “bullet points” at work, and they may quickly tune you out.³

You will hold the attention of visual learners by using a variety of visual aids, such as charts, models, and demonstrations. Use PowerPoint sparingly for emphasis or reinforcement.

Kinesthetic learners, on the other

hand, need to hold the records, feel the physical models, or have you verbally convey the sensory input involved in the diagnostic process. Kinesthetic learners are not limited to processing information by physical touch: They also use and respond well to language that evokes physical sensations, such as the phrase “get a handle on this problem.”

Although medical records may be the main visual element jurors need to see, other information might be equally important. For example, the layout of a hospital floor or intensive care unit may vary

thousand potential distractions. The most basic rule for getting jurors’ attention is a simple one: Don’t distract from your message.

Relevance. The tendency to tune out is strongest when 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 receive.

You can make relevance clear by con-

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.

significantly from what the jurors would picture on their own.

In a case based on a hospital staff’s failure to monitor and promptly respond to a patient’s symptoms, we learned in jury research that the assumptions jurors were making about sight lines, distance, and even the layout of beds in the hospital had a critical impact on their views about negligence. When we did not provide visuals, the visual learners created their own mental pictures, and we lost control of the “evidence” they used to decide the case.

Voir dire will usually reveal jurors’ learning styles. When they tell you about themselves, do they use visual, auditory, or kinesthetic language? Visual learners may say something visually oriented, such as, “I see no problem with . . .” Auditory learners may say, however, “It sounds to me like the plaintiff has . . .,” and kinesthetic learners may say, “I can’t handle looking at evidence . . .” 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 to fit the learning styles of the jurors who are seated.

Distraction. 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

structuring a good framework for your opening statement. The primary objective is to build the story slowly—layering the details in a methodical fashion—so that jurors are better able to absorb and retain what the case is about. Repetition of your themes strengthens the story’s framework and helps jurors remember information.

Once you establish a framework, listeners know what to do with new information you give them, and your work is largely done. But if jurors don’t have a clear framework for the case before they hear testimony, they are much less likely to be persuaded.

To construct a suitable framework—for example, in a medical negligence case—do the following:

- Outline the major case themes. An overview tells jurors what happened and its result.

- Frame the dispute. Provide a brief, nontechnical explanation of why you are in court, who is being sued, and why the defendants were negligent. The goal is to define each defendant’s major vio-

SUSAN MACPHERSON and JEREMY ROSE are staff members of the National Jury Project/Midwest in Minneapolis. © National Jury Project/Midwest. Adapted with permission.

lation so jurors know what the plaintiff has to prove to win. Use your theme for each defendant.

- Tell what was supposed to happen. Describe the standard of care. Use visual support to reinforce the standard and show causal relationships. Use lay language; introduce only medical terms that are related to major events or key issues. Present these events and issues in chronological order.

- Tell the story of negligence. Don't

tell every detail—just the details that most strongly support the conclusion of negligence. Don't shy away from acknowledging unfavorable facts, but discuss them in a way that reduces or minimizes their significance. Be sure to repeat your major themes.

- Frame the main defense arguments. Show what is wrong with them, but be careful not to distort them. End with a visual that simplifies your counterarguments so jurors have a good chance

of remembering them.

- Preview compensation issues. How you do this depends on the specifics of your case: Is life expectancy a critical point of dispute, or is home versus institutional care the main issue? Alert jurors to what they will have to decide, and preview the tools you will provide to help them with that decision.

- Summarize. Put your themes into the legal framework of medical negligence to help jurors understand what

Group dynamics in the jury box

JAINÉ FRASER

In any trial, only a few jurors actually drive the decision-making process. In mock trials and focus groups, the few jurors with strong personalities can influence more passive jurors, who may give in to the vocal minority quickly. Jury selection is not just about the number of plaintiff-friendly jurors on your panel.

On 12-member panels, you will often see jurors break into smaller groups that will stick together during trial. These groups will usually be determined by age, ethnicity, or education. Often, someone emerges as a leader from each group and may eventually represent it during the panel's deliberations.

To identify these groups during voir dire, observe hallway conversations, seating arrangements in the jury box, and those lunching together. It's important to consider this aspect of group dynamics when using your peremptory challenges.

A variety of factors can influence group dynamics among jurors, including whether some panelists have served on juries before or have expertise in the subject matter involved in the lawsuit. Other factors include age, occupation, education, and whether a person is likely to be a leader or a follower.

Jurors in their 20s and even early 30s may defer to those who are older. This doesn't mean they will change their opinions, but they might be more willing to go along with others in the group rather than hold out for what they believe. They may think the older jurors have more experi-

ence and know better what should be done.

Education also is important. Generally, the more education a juror has, the greater his or her influence on the group, partly because other jurors value education highly. As a practicing psychologist, I have worked with bright, successful people who did not have college degrees. They lived in fear that people would find this out and think less of them.

In a jury, people who hold certain occupations with vested authority or power—for example, teachers, executives, and lawyers—are also likely to carry more influence. The jury may also grant higher status to athletes, the wealthy, or relatives of high-profile people.

To identify possible leaders and followers among the jury pool, use questions during voir dire designed to reveal a juror's psychological personality type. For example, extroverted jurors, who are more likely to emerge as leaders, are inclined to answer questions at length and to raise their hands and express their opinions during voir dire. Their tendency is to speak more and listen less, and they will be more vocal in deliberations.

Introverts are more difficult to read. In voir dire, they are likely to give brief answers. They usually respond only to questions directed specifically to them. Also, they tend to reveal little or nothing of the thought processes that led them to those answers. Supplemental juror questionnaires can be useful with introverts; these

people are more likely to tell you their thoughts and feelings in a private setting than they are when speaking in front of a group.

Watch for other characteristics in jury selection. For instance, whether a juror is more of a "thinking type" or "feeling type" can help predict decision-making. Thinkers use logic and are rational in deciding both liability and damages. They are motivated by what's fair. Feelers are more empathetic, often inclined to compensate plaintiffs out of concern for their well-being. However, feelers also have a strong desire for harmony among people and may be more inclined to defer to others' opinions.

As you consider these specific characteristics of individual jurors, take a broad view of the panel you're assembling. Don't rely on only one or two demographic and personality traits in judging whether a juror will be receptive to your client's case. Look at all these characteristics in combination, and consider the configuration of the group as a whole, not only individual jurors.

Understanding jury psychology and group dynamics can be a great advantage. It will help you predict, as much as possible, how the 6 or 12 people on the jury will interact when it's time to make a decision as a group. ■

JAINÉ FRASER is a jury consultant and founder of the Trial Psychology Institute in Dallas.

they will have to determine about the defendant's liability.

Comprehension

If the jurors don't understand the information you give them, they won't be persuaded by it. All trial attorneys must learn to speak "legalese" to the court and plain English to jurors, but attorneys in medical negligence cases are trilingual: They must also be able to speak the language of medicine for going head-to-head with an opposing medical expert during deposition or when analyzing medical records.

In the opening statement, speaking in anything other than plain English can easily become a barrier to persuasion. But many attorneys find it difficult to abandon jargon when talking to jurors.

Some of the resistance undoubtedly comes from discomfort. When you hear yourself say "the air and blood supplies were cut off" or "swelling of the brain," it may 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 ruled out," the latter sounds awkward and unsophisticated. As a result, what starts out as a clear, plain-English opening may inadvertently begin to sound like a med-school lecture.

Some attorneys assume that defining a medical term once makes it part of the jurors' vocabulary. This is a dangerous assumption. Jurors often have difficulty correctly using medical terms after weeks of trial.

The opening is a good opportunity to introduce the most important medical terms jurors will hear in testimony, but keep in mind that they will retain only a limited amount of new information under the stressful conditions in which you deliver your opening. Most jurors are still feeling anxious about their new task and their unattended obligations outside the courtroom.

Think, for instance, how you react when traveling in a foreign country whose language you don't know. You don't glance at signs and instantly incorporate the words. Instead, you process them slowly with an internal di-

Medical Animations Online!

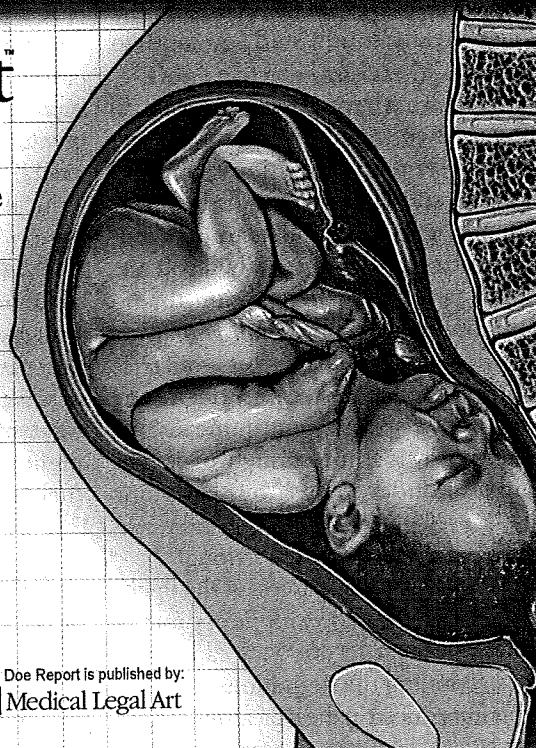
the DoeReport™

The Doe Report is the exclusive provider of online medical demonstrative evidence for the ATLA Extras program.

ATLA Members receive a 10% discount on thousands of medical exhibits.



The Doe Report is published by:
 Medical Legal Art



800.338.5954 - <http://atla.doereport.com/alliance>

Fight Fire with Fire

RING
OF
FIRE



RING OF FIRE on

Find a station at

ringoffireradio.com **866-389-FIRE**



ologue: "OK, that sign says *venstre*, and that means 'left,' and this one says *syd*, which means 'south,' and I go south to get to..."

Most jurors have a similar internal dialogue when you give the term "hypoxia" a one-sentence definition early in the opening and then use the word again—without explaining it—later on at a crucial point in your story. While you are making a key point on causation, the juror may be thinking: "Oh, *hypoxia*. Was that about the blood or breathing? It sounds important. 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 thinks this through.

Avoiding medical jargon in the opening has nothing to do with jurors' intelligence. 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

that new information in 45 minutes. Learning new information, and getting comfortable with using it, takes more time.

Be realistic: Assume the jurors will need the most important definitions repeated during the opening and during trial if you plan to use the new terms at critical points in your case presentation.

Acceptance

One of the most important steps in the process of persuasion is to help the jurors accept what you are saying. Acceptance is achieved by matching expectations. If what you say to jurors in the opening statement matches ideas that are already in their minds, they will accept it.

This means that jurors will not accept what you say simply because you are eloquent or logical, because you have proof, or because they like you. Instead, jurors will 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 alleged medical malpractice "crisis" has made many jurors more skeptical about what plaintiff attorneys say a reasonable doctor would do in a specific case, this aspect of the opening is particularly important.

Resist the temptation to discuss in detail what your experts will say about the standard of care. Trial simulations and posttrial interviews reveal that it is usually more effective in the opening statement to boil down the standard of care to simple rules that can be described in plain English.

For example, you could describe the standard of care in an anesthesiology negligence case as follows: "The anesthesiologist must foresee that a patient with known risk factors for postoperative respiratory compromise, who has already demonstrated signs and symptoms of respiratory compromise in the pulmonary

DepoNet is stronger than ever.

One Click connects you to the legal support professionals you need. Visit our new and exciting Website and find all the resources you need in one place.

It's Fast, Free & Easy!

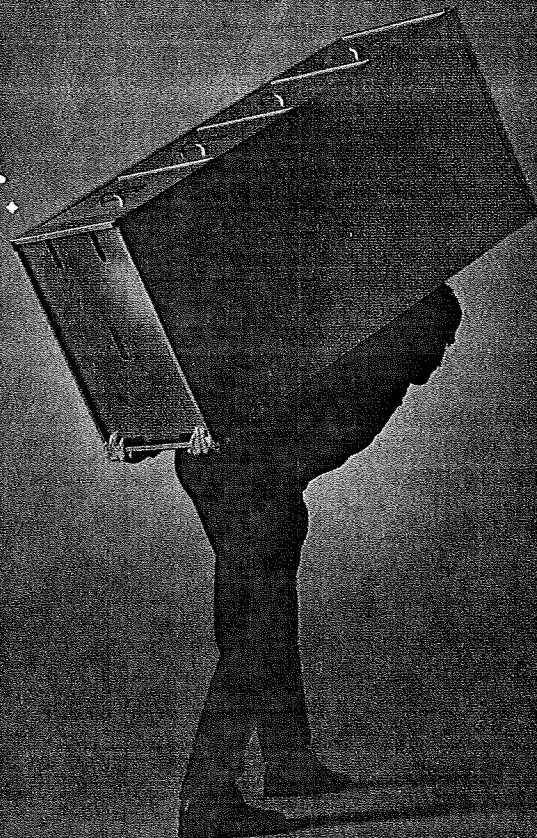
- Court Reporting Services
- Process Service
- Videoconferencing
- Legal Video Services
- Interpretation/Translation

www.DepoNet.com • 1-800-DepoNet

DEPONET
A HOBART WEST GROUP COMPANY

We Connect Professionals

DepoNet, LLC is a subsidiary of the Hobart West Group, Inc.
Copyright © 2005 DepoNet®. All Rights Reserved. 0605DF



acute care unit, is at risk for continued respiratory compromise and possible respiratory arrest until the effects of anesthesia and morphine have worn off."

But if you translate it into plain English, the logic of the standard will 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."

Even when standards of care are stated simply, your case will be more complex if many different standards are at issue. You may want to simplify the case by limiting your client's claims to violations for which you have the strongest evidence on causation and harm.

Retention

The most important decision to make in preparing the final draft of an opening statement in a complex case is this: What are the three most fundamental aspects of the case? In other words, what are the three things jurors absolutely must grasp and accept in order to find negligence? When you answer this question, you will determine how to keep your opening to a manageable length and enhance jurors' ability to retain what you say.

Although the "rule of threes" is a memory aid, it also serves another important function. Salespeople are taught to offer customers only three choices, because offering more than three overwhelms them. Plaintiff attorneys should strive to have three main points for the same reason.

In a case in which the doctor made 18 different mistakes in delivering a baby, for instance, sort the mistakes into three groups (such as inadequate record-keeping, failure to order the proper test, and delayed treatment). Jurors can remember more information if it is well organized, and the best way to organize it is in three categories.

Some nervous attorneys throw everything at the wall and see what sticks, hoping that jurors will find something convincing or memorable in the mass of information. But 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 past, eloquence was valued, and the golden-tongued speaker could sway an audience. In these less literate times, eloquence can actually backfire: If a juror is transfixed by your fancy terminology and intricate arguments, he or she may end up admiring you but not

will be harder for jurors to remember your critique while they are listening to the defense.

Don't make the mistake of distorting your opponents' arguments beyond recognition. Obvious exaggeration will hurt your credibility and trigger some counterarguing by the jurors, such as, "Nobody would say anything *that* foolish. The hospital must be trying to argue that..."

This is not to suggest that you should state the opposing arguments exactly as defense counsel would. The opportunity to frame them is an important advantage.

Eloquence can actually backfire: If a juror is transfixed by your fancy terminology and intricate arguments, he or she may end up admiring you but not remembering what you said.

remembering what you said.

When that 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 re-create your arguments or recall those polysyllabic words you were using, you've just lost your best advocate.

Action

The purpose of presenting a persuasive opening is not only to get the jurors oriented in your client's 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 one doesn't hold up or doesn't matter. There may be five or six reasons why the opposing arguments are wrong, but if you discuss them all, it

For example, you may frame the defense arguments as "assumptions" and use themes like "shifting responsibility" or "finger-pointing" when discussing them with jurors.

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 effects?

The last step in persuading listeners in the opening 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 in the opening is to convince the jury that compensating your client accomplishes that goal. ■

Notes

1. Herbert W. Simons, *Persuasion and Attitude Changes*, in *SPEECH COMMUNICATIONS BEHAVIOR: PERSPECTIVES & PRINCIPLES* 227-48 (L.L. Barker & R.J. Kibler eds., 1971).

2. C. I. HOVLAND ET AL., *COMMUNICATION & PERSUASION* (1953).

3. See EDWARD R. TUFTE, *THE COGNITIVE STYLE OF POWERPOINT* (2003), available at www.edwardtufte.com (last visited Feb. 23, 2006).