

Openings and Closings in Complex Commercial Disputes: The Human Factor

An Interview with Susan J. Macpherson
by David Ball

Susan J. Macpherson is Vice-President of the National Jury Project/Midwest, a full service trial consulting firm. She specializes in research on jury decision-making in commercial, intellectual property, and in complex commercial cases.

David Ball, a nationally known trial consultant, specializes in focus groups, jury selection, case analysis and strategy, and juror decision-making with respect to damages. He's a best selling trial advocacy author who teaches trial skills to experienced attorneys across the country and to law students at Duke, UNC, Wake Forest, and Campbell.

David Ball: You consult on a number of complex commercial disputes—cases that don't have many broken arms, armed robberies, or other obvious human components. What do you do when the human element is absent?

Susan Macpherson: The human element is never absent.

DB: How do you find it?

SM: To begin work on a case, we ask the attorney for a starter kit—whatever papers describe the core of each side's arguments that will go to the jury. Those papers might be things like arbitration papers, summary judgment papers, or internal memos to the corporate client outlining the strengths and weaknesses of both sides. Complex cases usually have a prepared set of materials for the lawyers and experts involved in the case.

The attorneys do well in these materials outlining the legal issues, the essential facts, the claims, the defenses, and the technical issues underlying the facts. But often we have to ask, "Where are the people in all this? Who are the people?"

There's always an answer. Even without broken legs or a death or any other immediately apparent human factors, these cases still have real, live human beings. And they have to be found.

DB: Why?

SM: You need the people because jurors funnel the facts through the story of the case—and the meaning of the story is carried only through the people acting in it. Facts don't walk in a neutral box. They come out of the mouth of a person who has character, motive, credibility or no credibility, and who's perceived as part of something big or something good or something bad.

When I ask, "Who are the people that will tell this story?" Attorneys often tell me about the designated representative who speaks for the corporation in depositions, or comes to court when the judge requests a corporate representative. Once in a while he or she was part of the story, but usually the person selected was removed from the key events.

Instead, we have to look at the people who were sitting in a room doing something that gave rise to the events in this case. They took some action, or made some decision not to take an action, or they wrote something or did any number of things. They're the people with motivations who did something. That's where to look for the story.

Some attorneys will tell me, "We've got great documents!"—meaning things like e-mails, letters, and memos. But documents by themselves are rarely as effective as expected because they never speak for themselves. Their impact can be changed by the context your opponent creates. Jurors ignore documents that don't support the story.

DB: Then why do attorneys like documents so much?

SM: The attorneys have already internalized the story. They've spent months or years learning the case. They know the story so well they've forgotten how the evidence looked without the context they've created. They may even have forgotten how they learned it, who told it, or how it unfolded to them.

When we work on case presentation, we go back into the collective trial team memory to dig out things the trial team may now be taking for granted. These may be story elements the team has come to view as givens, or as unimportant because those facts are undisputed or haven't even

been discussed in discovery. But these are often the very facts that tell the story. We often find several stories because the attorneys have made different assumptions about what happened. Sometimes our first task is to help select the best story by testing with focus groups.

For example, in a complex construction dispute there might be a pivotal battle between experts over the properties of metals. But from the jurors' point of view, the story doesn't revolve around the experts' dispute. The story is about how we got to the point where this is what we're fighting about.

So we unearth the memory of, say, who was at the table having the early conversations. What were people asking? What was the context within which critical information was requested or given? What were people told about the construction project that led to making decisions that eventually brought us here? What were the intentions and assumptions of the people on both sides of the table?

When much of that is undisputed, it is easy to fall into the trap of thinking it's not important. So instead of starting the story at the beginning, where people are at the heart of things, attorneys often start in the middle or at the end when there are no people but just experts and documents. After all, that's where the attorneys' most recent efforts have been: battling about what comes in, what stays out, finding evidence to support or oppose the legal theories that determine the way the case will be framed up in the end—that's where their focus has been. And that makes it hard for them to go back to the beginning of the underlying story.

Pretrial motions can also make that hard, because they can create habits that are difficult to change, such as the use of shorthand references, jargon, and technically correct terms, etc. This way of talking about the case has to be changed to tell the story to a jury.

If you don't have the opportunity to work with a trial consultant, sit down with a couple of lay people and start telling them the case. See where you go in your explanation when you tell the case to a totally naive individual. Someone who used to work with us at the National Jury Project called this the "cocktail party" version of your case. Others advise you to tell the

case to your 13-year-old. Reducing the case to a simple story for a 13-year-old might help you get at the essence of it. And the 13-year-old won't listen unless there are people in it. "Once there was this man who ran the family business. Now these are people who only wanted to hear the good news until it was too late to prevent . . ."

Something had to have happened between individuals for a problem to occur. That's where the story starts.

The next challenge in crafting the story for opening is to figure out how to tell the story. It's easy to get the jurors lost in the details by telling every single thing about the story. Have you ever had the unfortunate experience of being told the story of a book or movie? You stop listening when the details start piling up. Jurors have the same reaction. Too many names, too many dates, too many credentials, too many "by the ways" along the way—they all blur the story.

DB: How many details is too many?

SM: Every time you want to use a name, a date, or a credential, ask yourself, "Why?" Sometimes you need it so jurors can understand the story's context. If you're talking about somebody who made a decision, it's probably essential to tell jurors where that person is in the organization, and if she's a key character in your story all the way through trial, tell her name. But usually what she did is more important than who she is, so just telling her position is enough to move the story forward without forcing jurors to keep track of a name or a credential they don't need right now. Same thing with technical explanations—tell only what is necessary to get across what happened.

Edit out what's unnecessary so jurors don't drown in the details.

In post-verdict interviews I ask jurors, "What do you remember about opening?" What they often describe is the impression created by a powerful vignette—little segments of the story told simply enough and clearly enough for jurors to picture how the people in the room, doing whatever they're supposed to have been doing, felt at a critical moment.

You create these vignettes by slowing down enough to create the scene. Give ju-

rors a sense of the environment, the mood, and the characters, the actors in the room. If you help jurors "hear" the conversation, feel the key emotion, and visualize things happening, they tend to remember it. And that can have a powerful impact on their thinking. In commercial cases, jurors don't decide the case in opening. But the story, brought to life by vignettes, affects how they hear the rest of the case.

DB: Do jurors decide other kinds of cases in openings?

SM: I think it is more accurate to say they develop an impression that doesn't change. That's more likely to happen in cases where the jurors start out with a better understanding of the law.

DB: So in complex commercial disputes, what should an attorney try to achieve in opening?

SM: First, tell the story's broad outline along with a couple of carefully chosen vignettes—moments that convey the essence of what you think the case is about.

Second, help jurors understand what they have to decide. That's something many attorneys have begun to work on in a more systematic way. You sometimes get a judge who'll agree to pre-instruct the jury in the law, but when you don't, in opening you can frame the issues the jurors have to decide. You usually can't talk about legal standards in detail, but that isn't necessary to establish the basic concept and the framework, which you can and should do. Otherwise, jurors can go through trial with no idea how to sort the important from the unimportant evidence.

For example, in business litigation, jurors have no idea what claims such as negligent misrepresentation mean. So you have to develop that concept in opening for them to better use the evidence you later provide. If you don't define the framework for negligent misrepresentation in opening, jurors instead may be looking for—and never find—evidence of fraud.

Also, in almost all long cases, things come in out of order, so you have to give jurors the big picture of where they're headed and what they have to decide. That's true in every case, but especially in intellectual property cases, where the legal theories are the most foreign to lay peo-

ple. We've interviewed jurors who've decided patent cases and had no idea who won. They never got the big picture.

Unless you are relying on confusion, you've got a better chance of getting the answers you want if jurors know how their answers to the interrogatories fit the big picture.

DB: Are there some kinds of issues that jurors are more comfortable with than others?

SM: Jurors are more willing to grapple with technical evidence than we give them credit for. Attorneys often worry that lay people will never fathom the technical stuff or find it boring and dislike you for trying to teach it to them. But most jurors want to learn enough about the technical information to work effectively with the evidence. Everyone likes to feel comfortable in the terrain they're operating in. If you're a juror in a case involving metalurgy, you want to feel like you know enough to know your way around the testimony and understand the import of what's being said. Most jurors come to court quite willing to soak up technical or unfamiliar information. They want to make the right decision, so they're motivated to learn enough to do that. However, they may be anxious about whether they are going to get the help they need.

It's important to recognize their anxiety early on, and tell them two things: first, "We don't expect that anybody has any background in this," and second, "You don't have to be an expert to evaluate the evidence and decide this dispute. We can give you the background you need—starting right now."

DB: You do that in opening?

SM: If the technology drives the story. There are some stories that cannot be told or understood without some knowledge of the technology. At the beginning, jurors want to hear just enough about the technology to feel like they can understand the context of the story.

So in opening, don't say, "Let's start by defining terms" or "We'll bring in an expert who's going to teach it to you, and here's fifteen reasons why he's really good." The jurors don't care about technical definitions or expert credentials at that point.

Instead, find the "101" level of the case. Whether it's a Nuclear Power 101 or Bio-genetics 101 or Derivatives 101, there's a 101 level that can and should be presented in the opening. An outsider who's not burdened with the enormous amount the attorneys have learned about the case may have an easier time defining the 101 level of explanation. If you know too much, it can be a real struggle to simplify.

DB: So an attorney can know too much about the case.

SM: It is easy to confuse being accurate with being detailed. At the start of trial, jurors want to know that they'll get help learning enough to follow the evidence and make an intelligent decision. But they also want to know that they don't have to pick it up immediately, that you will go slow to avoid drowning them in information. So don't tell them that you're going to turn them into engineers or investment analysts or whatever—but that there is a limited amount of new information they'll need to understand, and that you will help them learn it.

DB: What else are jurors likely to latch on to?

SM: Jurors start with a basic question: What happened? Jurors want the plot. Because lawyers are supposed to focus on what's wrong; they often want to give the moral without the plot.

If you tell the story, jurors will know what's wrong. If you just tell what's wrong, they may construct a different story that doesn't support your conclusion.

DB: Always back to story.

SM: Exactly.

DB: Is story more important than visuals?

SM: By far. It is tempting to rely on visual aides to tell the story. Take time lines, for example. Sometimes it seems like that's the way to convey the whole story. But with all that stuff on the timeline no one can read it, and most of it means nothing to jurors. So the timeline ends up just saying that an awful lot of stuff happened. That doesn't clarify. It baffles.

It's also tempting to overuse visuals, when we are worried that a case is going to be boring. Of course a good visual at the

right moment can be wonderful. But for that to happen, there have to be very few visuals, and they have to be very good. Remember, visuals are like documents: independent of the story, they mean nothing. They have no intrinsic power. A timeline independent of the story has little impact.

If you use a timeline in opening, keep it simple—at a 101 level. In a construction case: here's the building phase, here's the crisis phase, here's the retrofit phase. You can introduce and name your story in segments, and show how long each segment was: The building segment, five years; the crisis, six months; the retrofit segment, two years. A timeline in opening should show no more than the broad organization of time in a simple way without detailing.

Actually, in most cases jurors quickly and easily understand the chronological order of the major events, so a timeline is often more useful at a later point to locate the details that come up in testimony, or as a summary device in closing.

In opening, it may be harder for jurors to keep track of the relationships among the actors, among the entities, and between the entities and the actors. The story in a commercial case often involves multiple companies, multiple company names, multiple key actors in each company. Visuals help jurors keep track of them as you tell your story of what happened, which is the first thing jurors want to know.

The next thing jurors want to know is what each side is contending. Then, what does the law say and what questions are they going to have to decide? And finally they want to know how you're going to show them you're right: "Whattaya got?"

Somewhere in opening you need to answer those questions—though not necessarily in that order. The order depends on what would be most dramatically and rhetorically effective in the particular case.

But don't waste the first five precious minutes of opening by doing things like introducing yourself, your clients, and your staff. The jurors paid attention during jury selection, so they already know who's who.

In jury selection, they may have been given a lot of information about the case, the parties, and the issues. Use that information as a springboard. If you start by repeating all of it, you are going back to the

beginning of the movie jurors already saw. They may just tune out.

Carefully decide how to best use that first five minutes. It might be to define the issues, or to tell the key event, or to explain the main legal issue ("the one thing you're going to have to decide is _____"). But you can be sure that a generic preface, or repeating names jurors have already heard, is not the best way to begin because it has no persuasive impact.

Then tell them where you're going. Give some sense of what you're going to talk about for the rest of opening and in what order. That helps jurors stay with you. They think, "OK, I've got that piece now, I understand, now we're going on to this next piece, and I know what he's going to talk about next, so I'm ready."

That makes jurors comfortable because they have some control over the information they're getting. If they have no idea where you're headed for the next hour it's harder for them to stick with you. They feel out of control of what's going on, so they often take back control at various points by thinking about something else

going on in the courtroom or what they're going to make for dinner. But if you say, "We're going together and here's where we're going, and here's how we're going to get there," they can sign on with you and say, "OK, I'll go with you."

That way, even if they get bored at one point, they're more likely to stay with you instead of drifting away completely. They say, "Okay, enough about your expert, let's get on to the next piece." They can say that because they know what the next piece is. You already told them.

In other words, teach your listeners how to listen to you. Give them listening tools. In oral communication, tools that help them organize are important. Think about how few times you depend solely on what you hear. It's rare, so for a lot of people, it is challenging — especially if they're note-takers and they're in a courtroom where they can't take notes. Because note-takers take notes not only to remember, but to keep what they're hearing organized.

DB: How do you feel about allowing jurors to take notes? If attorneys have a choice, should they?

SM: Yes.

DB: Regardless of which side or what kind of case?

SM: Yes, assuming that you want jurors to remember what you say and that you're not relying on confusion alone to win the case.

The jurors may not ever look back at their notes, but for some people the act of writing them helps them comprehend and retain what they hear. I interview jurors who say, "Oh, I filled 16 notebooks but I never really looked at them, I just did it to keep myself focused. I can't listen unless I am writing."

DB: An old habit from school.

SM: Very much a school habit. Some lawyers and judges worry about distractions: "What about the doodlers?" Well, if they don't doodle with their hands, they doodle with their brains.

DB: You talked about letting jurors know in opening what they're going to have to decide. How much detail should the opening go into when it comes to damages?

SM: Detailing how it's calculated and so forth is not such a good idea. It's information the jurors aren't ready to use, so it won't have much impact.

It's the same principle that applies to the "hot" document problem. If you give jurors information before they know what they're supposed to do with it, and they're not yet ready to work with that level of detail, they don't pay much attention. So it doesn't have much impact.

Before having any interest in how damages were calculated, they want to know what happened, who was involved, who did what to whom, what harm was caused, what each side is saying, what the jurors will have to decide, and so forth.

In some commercial cases you may have to worry that jurors will think you're exaggerating when it comes to money, so in opening you might want to begin the process of convincing jurors that your damage model is based on reality; you'd want to give jurors a preview of how your side's testimony will walk them through the way you arrived at your damages figures. So in opening you'd say, "It's our job to explain and to prove the numbers. To do that we'll bring in the people who did the

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work, the people who have hands-on knowledge."

You can explain that you've got experts who'll come in to make calculations, or do modeling, or whatever—but jurors want to know that there's a tangible connection between your model and the experience of the people actually involved in the problem. So, for example, tell the jury a little vignette about someone who actually did some hands-on work, and indicate that's the type of evidence used in calculating damages. That technique is useful if your trial simulations or your focus groups showed that this is an important issue for establishing credibility.

But never assume it is. Many of the commercial cases with a large amount of money at stake are not really about the numbers.

DB: In opening, should you tell jurors how much money is at stake?

SM: If you do it right, in voir dire you can give jurors a sense of the scope of damages and how you intend to go about proving it.

DB: One school of thought says the opposite—that it's better not to tell jurors anything about money up front.

SM: I would be very surprised to find a case in which waiting is a good idea for the plaintiff. You want jurors to factor in the scope of the harm from the start.

DB: I've heard you say that using analogies too early is also a mistake.

SM: Analogies are good but not early in opening. Especially in commercial or technical cases, attorneys want to reach outside the confines of the facts to find something familiar and comfortable for jurors. They want a folksy kind of story, easy to relate to. And often they want to use that analogy early in opening because they think it will establish their credibility or their moral right to assert their position.

But jurors know you're not talking about what they're there to hear. They want you to get down to business and tell what happened. Analogies are devices that summarize—that justify or highlight conclusions. You may be able to effectively use an analogy at the end of opening when you're summing up. But be certain

that you have tested it in some fashion. If you haven't, it may not be worth taking the risk because we all know that analogies can have an unintended impact.

DB: What are other common mistakes in openings?

SM: Reciting the litany of witnesses: "Here's who you're going to see." Even 5 or 10 minutes of that is too long, because it invites jurors to tune out. You have to really ask yourself how important it is for jurors to get all those names up front.

It is usually more useful to say, "We're going to organize our information like this: First, you'll hear from X kinds of witnesses. Then, you'll hear from Y kinds of witnesses." Give them a broad outline of how you intend to put on your case. But reciting the witnesses' names and affiliations and their order of appearance is not useful. In complex cases, they rarely appear in the expected order anyway.

And telling your experts' credentials is probably the least useful. Say, "We'll have an expert to tell you about this aspect of the problem." But saying, "We have an expert from Harvard, he's done this, he's done that, he's done the other thing," is not worth the time.

Another problem in opening is giving in to the temptation of drawing conclusions. "When you've heard all the evidence, you're going to decide this, you're going to decide that, you're going to see that we're right and they're wrong, that this is important, and that these damages are valid."

DB: What's wrong with that?

SM: Drawing conclusions too early sets up a counter-arguing mindset in a lot of jurors. They say to themselves, "Wait a minute—I'm the one who's supposed to make those decisions. Don't get in my face. You can tell me what questions I'm supposed to answer, and what questions I should be asking as I listen to the evidence, but don't tell me what or how I'm going to answer those questions." Don't tread on the jurors' turf.

DB: What about length of opening?

SM: If you think you have to talk longer than an hour, that usually means you have more work to do on defining the story. Ju-

rors can't take in more than an hour's worth of information and keep it organized. Before the hour's over, you're going to lose most of them. So even if you think you absolutely have to go more than an hour, remember two things: 1) they're not going to retain what you're saying anyway, and 2) making the hard choices you need to make to stay under 1 hour will usually *strengthen* your presentation. We often think taking things out makes it weaker, but it usually has the opposite affect.

DB: Attorneys often tell me, "I'm sorry, but this case is so complex that I need two and a half hours . . ."

SM: And you have to say back, "The only way the jurors will understand it is if you get it down to a simpler version for the introduction. Opening is not the case. Opening is just the bare bones story—the 101 level of the case.

DB: If opening is the introduction, what's the closing?

SM: When I talk to jurors, they often tell me that by closing they already know what the attorneys are going to say. They are not looking for anything new, but they may be looking for help with how to decide the dispute. They want help with the law, help with the verdict form, and help with how they're going to take everything they've heard and work with it and make decisions. That's what they're anxious about, especially in longer trials. By the start of closing, many jurors are mentally moving into the deliberation room.

Jurors say that just reviewing the evidence has little impact on them. "The closing didn't matter because I'd already heard all that. I wasn't hearing anything new. It didn't change my opinion. All I was thinking about was what we were going to do next."

So help them with what they're going to do next. In a civil case where the legal concepts are unfamiliar, it's almost always preferable for the judge to have given some instructions before closing.

If the judge won't do that, work out with the judge how far you can go in addressing the law. Doing that in advance avoids objections.

The jurors want help in knowing the

consequences of their answers. They want help figuring out which evidence ties into which verdict question.

To prepare your closing, have a lay person read the jury instructions and tell you what parts they find confusing and hard to understand. Then figure out how you can work jurors through that. You have to figure out how to make the law work your way, because there's often a gap for jurors between the law and what the attorneys are arguing. That's one critical thing I often see neglected.

Frequently, attorneys on both sides have favorite moments that occurred during trial which they want to revisit in closing. But those moments may or may not be all that important in terms of the ultimate decision. So before talking about the testimony of a particular witness, ask yourself exactly what you're trying to accomplish with it. It's as important in closing as it is in opening to be crystal clear in your mind about how you want jurors to use what you're saying: Are you trying to organize information? Are you trying to help them understand how to apply the law? Are you trying to help them remember what an expert said? If you don't know exactly what you want them to do with what you're saying, don't say it.

And in the complex commercial cases we're talking about, you have to pay particular attention to the problem of documents. In a large trial, key documents may have been referred to in different ways and by different numbers. Often, the jurors end up with a big box of documents not organized in any way. If you're the one who wants jurors to be able to use the

documents, give them an index so they can find them. In the first part of deliberations jurors often spend a lot of time just trying to figure out which document is which. "I had in my notes Plaintiff 55." "That's the page number; the number I've got for that document is Exhibit 21." And unfortunately sometimes they just give up on finding some of them.

If there are more than 20 documents, make up an index that identifies each document by whatever numbers have been used for it as well as by whatever it has been called—the Jones letter, the February 17 contract, and so forth.

DB: What about the human element you talked about for opening? Still important in closing?

SM: Yes. You have to tie it all back to the basic story. Otherwise your closing is just a long list of factoids.

DB: There's a lot of debate about how important closings are.

SM: In a complicated civil commercial case, a closing that helps jurors understand how they should approach the decision-making process can make the critical difference. You might have done a great job up until then, yet if jurors don't understand how the law supports what you've been saying, you're in trouble.

But don't just tell them what they've already heard. The closing has to do something different. Organize the information they've heard in a way that helps them understand how to work with it. That may mean organizing it in a way that ties it to the questions on the verdict form, or orga-

nizing it with respect to the claims. But be careful of substituting emotion for organization. Just calling the evidence "outrageous" or "devastating" won't change how jurors feel about it.

A lot of attorneys feel that closing is their chance to motivate the jurors. But except for criminal trials where the defense puts on no evidence, I've never seen a case where the juror motivation was initiated by closing arguments. It develops (or fails to develop) earlier. By closing, jurors have already decided what they think about what happened. You can't stand up and tell jurors they saw a different movie. They've already got the movie. The question now is, what do they do with it?

Think of closing as the first part of deliberations, because that's where many of the jurors may already be. They've got all the evidence. They understand what the law is going to be, particularly if they've been given a pre-instruction before closing. They're now mentally moving into the jury room.

If you see it that way, you'll understand why it's important to arm your advocates, the jurors who are favorable to your side. Arming them means things like giving them the short answers to tough questions. "Well, what about that expert? He said something different. What about this memo? That says something different." Make sure you provide short answers your advocates can repeat. That means it has to be stated in everyday language—the way people really talk to each other.

DB: Why short?

SM: So your advocates will remember. By closing they understand the whole, so they understand how shorthand answers fit the whole. Your advocates will be comfortable dealing with short phrases. They can remember them, they can work with them.

For example, they saw five experts on one issue—two for one side, two for the other, and one rebuttal. Help them sum up: what's the short answer on that issue? Your advocates are saying, "Don't tell me again what all those experts said, I know what they said, and God help you if you want to remind me about their superior credentials. Just give me the short answer: WHY ARE WE RIGHT ON THAT?"



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If the other side scored tremendous points on something, don't pretend it didn't happen. Give your advocates the short answer for why it didn't matter or why it doesn't decide the dispute.

One of the reasons long closings are often not helpful for jurors is because long closings usually mean the attorneys gave long answers. Your juror advocates won't remember long answers, and even if they do remember, they're less likely to use them because that's not how jurors talk in deliberations.

Ultimately, closing is about your favorable jurors. That's why a lot of good lawyers prepare for closing by having someone take copious notes in jury selection and looking at those notes now. Of course, lawyers have been thinking about the jurors all the way through trial, but rarely focusing on them as individuals because so many things go on during trial. So in preparing closing, sit back and think about who the jurors are. What are their life experiences? From what framework are they viewing this problem? You may find things from jury selection notes you can refer to in closing. You may find guidance about what kinds of analogies and terms to use that connect to your jurors' day-to-day experiences.

DB: How about thanking the jurors in closing?

SM: Everyone appreciates a brief, heartfelt acknowledgment of their efforts. It's a good idea to do that. But your time is so precious. And they're not going to like you more if you spend ten minutes instead of thirty seconds thanking them. Just acknowledge how hard they've worked, how much it's appreciated, and how confident you are in their skills. If you do so in a genuine way using plain language, they'll feel more warmly toward you. After all, at that point many of them are feeling pretty overwhelmed. They're anxious. So they appreciate your making them feel they've done a good job and that you know they're going to do a good job.

DB: Where should that come in closing?

SM: Not the beginning.

DB: Why not?

SM: Because the beginning of closing is

like the beginning of opening: you have those first five critical, precious minutes that jurors will listen to even if they've tuned out during the latter part of the trial and mentally gone shopping. Many attorneys use a thank you as a preface. A preface of any kind wastes that five precious minutes. Say thanks later and don't waste the first few minutes.

A lot of what we talked about for openings holds for closings. You have to tell them where you're going: "Here's what we'll talk about now. And then we'll talk about X, then Y . . ." Now, don't do that in your first 5 minutes, but remember that providing an overview makes everything you say more effective.

And some clean-up items: First, louder is not clearer. When trying to be very clear about something, many attorneys tend to raise their voices.

DB: That's called "The American in Europe."

SM: Exactly. "I SAID IT IS. . . ." And instead of thinking about what you're saying, jurors wonder why you're yelling at them. Lowering your voice is often more effective than raising your voice.

And it's been said ten million times, but it's worth saying again: silence is powerful. You can have a greater impact by pausing and building tension than by raising your voice. And making good eye contact with everybody in the box is critical.

DB: What about high tech visual aids?

SM: I would say one thing firmly: attorneys should not feel they have to use Power Point or any electronic kind of technology in opening or closing unless they are comfortable with it. Many attorneys feel that if they don't have that technological level of presentation, they'll seem unprepared or unsophisticated or uninteresting. But it gives you an advantage only if you are truly comfortable using it. If not, using technology can actually be a disadvantage.

It may hinder your ability to connect with the jurors. If you are connecting with people in a genuine, human way, you have a hundred times the persuasive power of any picture. You persuade by connecting with what's going on inside the jurors, not by dazzling them with technology.

I don't mean you have to be an actor or

an entertainer. What you have to be is a human being who is clear and authentic. Some people are naturally good actors, naturally entertaining, and they can capitalize on that. But if you're not, you can still be earnest and true enough in how you talk to jurors that no one could ever think you were lying about anything. You have to find whatever your strength is in presentation and make the most of it.

Think of it this way: the things that make you good in front of a jury are not technology and pictures, but the things that make you somebody's good and trusted friend.

DB: That statement means so much that we could do a whole new interview about it.

SM: Next time.

DB: It's a deal. ■