



Preventing Nuclear Verdicts: Workshop & Trial Academy
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Session Five: Opening Statements: Frame Your Case for Success

Lay a Foundation for Closing Arguments with Opening Statements

Closing arguments begin with opening statements. A recent mock juror decision-making study from Cornell University reveals 85% of potential jurors display “pre-decisional bias.”ⁱ The evidence they hear throughout the trial is biased towards the early interpretations they form early in the case. Jurors discern quickly who is credible, who may be untrustworthy, and whom they prefer. Compelling opening statements must display a good first impression and prove to the juror the attorney is knowledgeable and credible. Opening statements must also discuss the key evidence and arguments in a compelling manner. The opening statement must confirm the juror’s values and beliefs and begin moving the jurors to align with your arguments.

How to Use Opening Statements to Tell a Story

Focus groups and mock juries demonstrate establishing a framework the jurors can view the case as early as possible helps gain the attention, and therefore, trust of the jury. Opening statements must be interesting and compelling because this is when jurors receive crucial information needed to understand the case and form their own internal frames of reference in deciding whether the case matches their attitudes, beliefs and values. To deliver a compelling opening statement, jurors must focus on the story, set the case theme, and demonstrate to jurors your case aligns with their values.ⁱⁱ

Generally, opening statements should introduce the defendant, state the facts, define the issues, and reference the applicable law. This is best done through story telling. Great stories engage the intellect and stimulate emotions. Stories create a visual in the juror’s mind they are more likely to remember. Stories contain drama, tension, and conflict, and the listener is set with the task of resolving the crisis. The best way to begin creating this story is to provide a hero and a villain. The hero is put into a conflict they must overcome. A moral principle exists behind every hero’s goal. Every case must be reduced to

a simple story focused on a simple theme. The theme is meant to grab attention and highlight the injustice in the case. The theme ties all the evidence and facts together in a quick and short catch phrase easy to remember. The legal elements of the alleged incident should be incorporated into the story. The plot should link the actions or non-actions of the wrong doer to the resulting harm. By doing so, the jury is already primed of the legal issues in a way they will saliently remember.ⁱⁱⁱ

Explain the Evidence That Will Be Discussed

If a party does not explain or deny evidence against the other party when they could reasonably have done so based on what they knew, the jury may consider their failure to explain while evaluating evidence.^{iv} It is important to explain the evidence because it helps jurors understand the particulars or technicalities of the case.

The use of charts or graphics can be effective in explaining the evidence. Every graphic must support your overall message or theme. It must be focused and simple, easy to read, and convey the purpose of the evidence. Bullet points are also impactful in simplifying key components of the case and important points from the evidence the jury should understand.^v

Give a Number

Defense counsel has a responsibility to mitigate risks for their client. This may include contesting liability because our client is innocent, or it may mean admitting liability but arguing for a lower damages number. Defense counsel must represent what the actual damages are to the jury by showing reasonable and quantifiable economic damages. In *Estrada v. Mercy Hospital*, the Third Circuit stated damages are to place the injured party in “an actual, as distinguished from a theoretical position, financially equal to that which he would have occupied had his injuries not occurred.”^{vi} Without providing a number early in the litigation process, the jury is only hearing the large number provided by plaintiff’s counsel.

What Does Science Tell Us?

Jurors tend to award lower damages when they are provided a defense number early and when they hear it often. When jurors hear a number during voir dire, a priming effect takes place. The priming technique is used to influence memory and attention which can have an impact on decision making. Exposure to stimuli early has the impact of being more memorable when someone is trying to recall

information. A jury primed by repeatedly hearing the defense's requested damages number will be more likely to award a number close to the defense's number.

When Should Defense Accept Responsibility?

Admission of facts made during opening statements binds clients. The defense should admit facts the plaintiff can prove but are not prejudicial to the defendant. Defense counsel should tell the jury in their opening statement the defendant admits liability if there is no doubt they caused the incident. The defense should be cautious in their approach to not prejudice the jury or increase the verdict size. If a reasonably good defense exists, it is better to not admit liability.^{vii}

How to Give a Number

Defense counsel must give their number throughout the trial, from voir dire to closing. In between closing, defense counsel should also give their number even when the plaintiff's attorneys are putting on their case. One way to do so is by using experts. Defense counsel can ask, for example, a doctor how much the medical treatment will cost. If much lower than the plaintiff's proposed number, this will highlight how their number may be unreasonable, and how the defense counsel's number is better to make the plaintiff whole. The defense can bring up their number with the plaintiff witnesses as well.

In providing the jury with an accurate number for damages, defense counsel can use data from the U.S. Census Bureau and perform a statistical analysis of a loss of future earnings. A regression analysis is a statistical tool to examine relationships between variables, such as gender, race, age, occupation, location, and earnings. The "big five" variables are age, race, sex, location, and disability. The Census database contains a vast amount of information that can be statistically significant depending on the variables in order to provide an accurate defense number. The expert economist, after performing this analysis, will be able to state within a degree of certainty the variables relevant in your case. Having access to the plaintiff's earning history is also important in determining their lost future income. When this information is not available, using the Census database with variables like those of the plaintiff can help determine an accurate depiction of the plaintiff's lost future earnings.^{viii}

Can You Still Get a Defense Verdict?

It is possible to obtain a defense verdict even when giving a number to the jury. While it may seem contradictory to provide a defense number while also trying to get the jury to return a defense verdict, a

2016 University of Iowa law review article shows offering a defense number is more likely to return a defense verdict.^{ix} Defense counsel must give the number at the beginning of trial and explain why this number is reasonable while also asking for a defense verdict. The jury is less likely to believe an attorney who waits until the end of trial to give a number for the first time, especially after hearing the large number from plaintiff's counsel throughout trial.

ⁱ Dominic Gianna, *The Art of the Beginning*, Opening Statements 4.2 (2021) (hereinafter Gianna, *Beginning*).

ⁱⁱ Gianna, *Beginning*.

ⁱⁱⁱ Gianna, *Beginning*.

^{iv} Judicial Council of California Civil Jury Instruction 205.

^v Dominic J. Gianna, *A Touch of Exhibit Presentation Advice*, Opening Statements 15:3 (2021) (hereinafter Gianna, *A Touch*)

^{vi} Gianna, *A Touch*.

^{vii} Jerome Stern, *Opening Statements – Defense View*, 5 Am. Jur. Trials 305 (1996).

^{viii} Brian Todd Dunmire, Richard Snyder, *The Plaintiff is Asking for How Much? Using Census Data to Give the Jury a Reliable number Regarding Future Earnings in Personal Injury Actions*, 32 No. 3 Trial Advoc. Q. 19 (2013).

^{ix} Robert F. Tyson, Jr., *Nuclear Verdicts: Defending Justice for All* (2020).