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OPENING STATEMENT

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INTRODUCTION

Jury research over the years has been consistent: approximately 75 percent of jurors decide the case the same as they would after only hearing opening statements. This fact is not as surprising as it sounds when you consider that the purpose of opening statement is to tell the story of your case. You must introduce the elements of your case: the villain, hero, theory, and theme(s). You need to tell the jurors why they should care about what happened, and how to fix the injustice that has occurred in a way that protects their community. If you tell your story in a way that is faithful to the evidence, it makes sense that most of the jurors will rule in your favor, whether after your opening or at the end of the case.

The first two minutes of your opening statement are critical and should touch on all of the elements above. Remember, you only get one chance to make a first impression. As a result of the vast array of instant information at our fingertips, the attention span of the average adult is at an all-time low. Some statistics suggest it may be as little as five minutes for following a conversation or story, and as short as eight seconds when focusing on a single object or exhibit.¹

In addition to dealing with shortened attention spans, you also need to consider that insurance companies and corporations have exposed today's jurors to aggressive and misleading media campaigns about the justice system. These campaigns are aimed at inhibiting the ability of the average person to be truly fair and impartial. We have been vilified and painted as "greedy trial lawyers" who are only interested in our contingency fees. At the outset, we must recognize that the following attitudes are present to some degree in every jury box:

- ◆ A fundamental mistrust of lawyers and the jury system
- ◆ The belief that the system is "out of control" and requires reform and restrictions on jury awards
- ◆ The feeling that lawyers have no integrity and will do whatever they can to secure a lucrative payday
- ◆ The belief that people who bring lawsuits are looking for a lottery or windfall
- ◆ The belief that most cases are frivolous or nuisance cases
- ◆ The misconception that the defendant being sued is the victim, instead of the plaintiff who has suffered the actual harm

How do you break through juror cynicism? The key to winning your case is the ability to tell a great story. The goal of this chapter is to give you tools to improve your opening through storytelling.

¹Neil Vidyarthi, "How Social Media Is Ruining Our Minds," *Social Times* (12/14/2011), <http://www.socialtimes.com>.

Many years ago, the legendary trial lawyer Gerry Spence addressed the importance of the story:

“If I can finally understand the case in simple terms, I can, in turn, tell the same story to the jury and make them understand it as well. . . . That is what the art of advocacy comes down to—the telling of the true story of one’s case.”²

Despite the challenges listed above, the role of the trial lawyer is more important than ever. Our system of justice and the quality of life we enjoy in this country are both dependent on the standards set by jurors. We must recognize and combat jurors’ preconditioned notions that trial lawyers are greedy and dishonest and that our cases are frivolous or driven by selfish means.

KNOW YOUR AUDIENCE AND RECOGNIZE THEIR ATTITUDES AND PERCEPTIONS

Why are our modern jurors so cynical? By the time the average child has reached her eighteenth birthday (just ripe for jury age), she has been exposed to more than a million advertisements trying to sell her something. That child has experienced the disappointment of sending off for the secret decoder ring and discovering that it is nothing like it was advertised, or like in the movie *A Christmas Story*, the secret message says to “be sure to drink your Ovaltine.” Our jurors, young and old alike, walk into the courtroom with the certain knowledge that people trying to sell you something *lie*.

On top of that general prejudice, most everything they have heard in the media about trial lawyers is that we are the least trustworthy of all. They’ve been told that our job is to obscure truth, win at all costs, or sell them a bill of goods. As a result of this preconditioning propaganda, jurors begin every trial with

²Spence, Gerry. “How to Make a Complex Case Come Alive for a Jury,” *American Bar Association Journal* 72 (April 1986): 65

the mind-set that this is likely to be one of those “frivolous lawsuits” they have heard about. Before you have spoken one word, many jurors have a preexisting opinion that you are someone they should not believe. Unless you can break through the cynicism, your jurors will not listen to what you have to say.

Despite the negative propaganda, we must assume jurors are still universally motivated to *do the right thing*. If they are properly motivated, they want their verdict to *make a difference*, and not only in their community but also in our country. How do we break through their cynicism to reach their hearts and minds?

THEORIES, THEMES, AND GREAT STORIES

How do advertisers break through the resistance built up by overexposure to advertising? Studies show that the old techniques such as brand comparisons (“our detergent removes stains better than their detergent”), testimonials (Michael Jordan swearing he eats a Ballpark hot dog after the big game), touting a product as the cheapest brand, and denigrating the competition are no longer as effective at selling products.

What does still work on modern consumers? Commercials that tell a good story: an insurance company’s story told in reverse about a car that was parked and went off a cliff into the water; the Volkswagen commercial of the little boy in the Darth Vader costume who tries to use his “force” to start various electric appliances until it works on his dad’s car; Chrysler’s “halftime in America” story of the American spirit in Detroit; and the devastatingly effective political commercial about how a worker was forced to build the stage upon which Bain Capital announced his own job would be terminated.

Advertisers were not the first to recognize that an emotional connection through good storytelling is the best way to reach your audience. There is a Chinese proverb that expresses the basics of communication in the following manner: “Tell me and I’ll forget; show me and I may remember; involve me and I’ll understand.”

There are three basic ingredients for a great opening statement: