What I Learned From Teaching Trial Advocacy:

Opening Statements and Storytelling

Part One of a five-part series.

TAKEAWAYS >>

- Trial persuasion requires making events come to life by mastering the intricately connected answers to who, when, what, where, how, and why.
- Total storytelling activates jurors' senses, conveys unforgettable realism, and builds a narrative world confirmed by witness testimony and evidence.
- Defense attorneys who prefer not to reveal too much about their trial strategy during opening statements may still use storytelling when their case is particularly strong. Defense attorneys with a weak story to tell should at least consider whether a negotiated resolution is in order when the other side's story is notably compelling.

BY GINO L. DiVITO

I LEARNED MUCH FROM TEACHING. AN EARLY REALIZATION WAS THAT EFFECTIVE teaching requires subject-matter knowledge coupled with relevant, entertaining, and compelling information.

I learned, too, that one earns subject-matter knowledge through study and experience. I have had a full dose of both. I've studied ample amounts of trial advocacy information from books, lectures, articles, and the Web. And I've learned from more than three decades of teaching trial advocacy: in Chicago and other far-flung locations; in collaboration with extraordinarily talented judges and lawyers; in adapting to teaching's inherent demands; in serving as the lead attorney in well more than a hundred jury trials; in serving for 12 years as a trial judge; and from eight years on the Illinois Appellate Court in reviewing trial-related briefs, trial transcripts, and oral arguments.

Boldly risking the possibility of censure for flawed opinions, I nevertheless dare to share this series on trial advocacy based on those experiences, but mostly from lessons learned from teaching law students and attorneys how best to navigate through the four stages of a trial: 1) opening statements, which will be covered in two parts; 2) direct examination; 3) cross-examination; and 4) closing arguments.

As in news reporting and teaching, trials require answers to the standard six questions that begin with "who," "what," "when," "where," "why," and "how." This applies to opening statements, and continues with testimony about *who* the witness is, and *when* and *where* the witness acquired information; and they continue with testimony about the witness's knowledge of *what* and *how* and *why* events happened.

But in this series, answers to those questions are not about witness sequence or the need to present witness testimony, but about how trial attorneys apply answers for persuasion in the various stages of a trial.

Thus, my answer to the "who" question is not merely to identify witnesses, but to ensure that your witnesses are viewed as trustworthy and reasonable—and that you are viewed similarly.

Likewise, the three important questions about what to do and how and why to do it—answers that frequently overlap, and sometimes are indistinguishable—must be based on the need to recreate past events by also answering where and when they occurred. The combined answers to those six questions are essential for making events come to life. Indeed, answers in the courtroom—about the advocate and about the facts that create past events—are the bedrock for trial persuasion.

This five-part series shares my personal experiences based primarily on trying cases and teaching the four stages of trial advocacy. All five parts in this series published by the Illinois Bar Journal incorporate the numerous examples, lectures, and anecdotes I've used to enlighten and entertain law students and attorneys on the art of persuasion in trials—primarily in jury trials. I take full responsibility for any failure to offer guidance on subjects I should not have overlooked.

My opinions are my own. You, however, are entitled to your own opinions based on your personal experience. If you disagree—if what you do works for you, if your methods have produced persistent success—my conflicting opinions should be rejected. My sole goal, after all, is to offer a contribution to trial advocacy excellence for our legal system, one that already has deservedly earned the world's gold standard for obtaining truth and justice.

ISBA RESOURCES >>

- Benjamin R. Lawson, *Trial Lessons From Comedians*, 111 Ill. B.J. 36 (Aug. 2023), law.isba.org/3PaewVE.
- Bruno R. Marasso, *Trying Your First Case: A Primer on Getting to Opening Statements*, YLDNews (June 2019), law.isba.org/33yOrGs.
- Maureen B. Collins, *Lawyer as Storyteller*, 88 Ill. B.J. 289 (May 2000), law.isba.org/3YQT2QY.

From October 2023 through February 2024, the Illinois Bar Journal will be publishing a special five-part series on trial advocacy by **GINO DiVITO**, *who cofounded and is a partner in the Chicago law firm of Tabet DiVito & Rothstein LLC. He has served as a trial judge and as a justice of the First District of the Illinois Appellate Court. He is the author of the ISBA publication, "The Illinois Rules of Evidence: A Color-Coded Guide," which is updated annually.*

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PERSUASIVE OPENING STATEMENTS RESULT IN THE FUSION OF WHAT JURORS FIRST LEARN AND WHAT THEY HEAR AND EXPERIENCE FROM WITNESS TESTIMONY, THUS AUGMENTING EVEN TESTIMONY OTHERWISE LACKING PERSUASION.

Opening statements

What to do. On the first day of every trial advocacy class—the orientation session—I invariably assured law students, usually assembled in a Daley Center courtroom in Chicago's Loop, that, before they embark on any of their assigned trial exercises, I would do my best to fully prepare them on what to do. Then, on the scheduled day for opening statements—before they were to assemble in groups of eight led by fellow instructors—I reminded the students of my promise.

Immediately after making that announcement, though, I pointed out that they might have noticed that I appeared somewhat disoriented. Agreeing, I explained that I was still traumatized by the terrible accident I had seen while walking to class—an accident they also may have seen. And then, prompted by bewildered looks, shoulder shrugs, and heads shaking left and right, I realized the accident had occurred on the south side of the Daley Center, the direction from which I had come; but the students could not have seen the accident, since they had come from their law school, located north of the Daley Center building.

I then began telling them about the accident I had seen:

> You no doubt have seen the outrageous behavior of bicycle messengers in Chicago's Loop. You've seen how they often ride recklessly at great speed while sometimes going the wrong way in one-way traffic, and how they habitually ignore traffic lights.
>
> And you're probably familiar with the Chicago Temple Building, which abuts the sidewalk on the southeast corner of Washington and Clark streets, across from the Daley Center. You probably know that Washington and Clark are one-way intersecting streets in the Loop, with Washington accommodating only east-bound traffic and Clark only south-bound traffic.
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> While I waited for the light to turn green to cross Washington, an eastbound car on that street—one that had the green light—drove through the intersection and struck a messenger-service bicyclist, who was cycling northbound the wrong way through the solid red light on Clark.
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> When the car crashed into the bicycle, both it and the messenger flew about 10 feet in the air. I hesitate to tell you this … but the cyclist was beheaded.
>
> Then, after hitting the cyclist, the car swerved to the right, narrowly missing others and me, but it hit a man and a woman on the sidewalk, pinning them against the Chicago Temple Building. As parts of the car were enveloped in flames, I saw a young child strapped into the backseat of the car. I instinctively opened the back door of the car, managed to unbuckle the child from the seatbelt, and calmed the screaming child, who was unhurt. Others bravely pulled the unconscious driver from the car, but he was badly burned. Still others moved the car from the pinned and bloodied pedestrians and began attending to them.

What I told the students was accompanied by demonstrations of traffic flows, the collisions of car and cyclist and pedestrians, and my own avoidance of the out-of-control car—demonstrations enhanced by appropriate emotion and by animated body movements in order to: indicate car and bicycle directions on the courtroom floor; recreate directions and collisions; act out how I avoided being struck by the car; and demonstrate my actions in saving the child and the actions of others in removing the driver from the car and in caring for the injured pedestrians.

The students had been gasping and were audibly responding in horror from the instant they learned of the beheaded cyclist. I then paused, and loudly proclaimed: "Now that's an opening statement!"

After I made it clear that no cyclist had been beheaded, no one was struck by a car, and no child or anyone else needed to be rescued, relief and laughter filled the courtroom. I then announced: "That's how you make an opening statement! Now, let's discuss how it affected you and why you believed it—why it worked."

Storytelling

First of all, I told and demonstrated a **story**. A false one to be sure, and one that would never be allowed in a trial based on an attorney's personal perceptions—but a teaching demonstration that first previewed buildings and streets and the actions of a cyclist, all possibly familiar to at least some jurors. Such familiarity may play an important role in opening statements—where some jurors may have experienced similar behavior of a key person in the action, as well as places where the action occurred. Such information may conform with jurors' knowledge or experience and may thus enhance credibility.

Telling a story—either through total opening statements or as essential parts of one—presents an important start for persuasion. But successful opening statements require more than talk. You must **show** truth. You do that through the use of admissible physical evidence when available, and by creating word-pictures by speech, emotion, and body movements that establish images evoking reality.

The reality evoked through opening statements sets the table for all the testimony to follow. Where witness testimony is effective, it confirms and bolsters what opening statements provided. And, in instances where witness testimony lacks effectiveness, opening statements may provide welcome support, because of the inexorable intertwining of opening statements with witness testimony. The two become one, *even though opening statements are not evidence*. Persuasive opening statements result in the fusion of what jurors first learn and what they hear and experience from witness testimony, thus augmenting even testimony otherwise lacking persuasion.

Everyone, from childhood on, enjoys a good story. Especially one that expands knowledge and is consistent with experience and beliefs, and even

one that willingly suspends reality for the semblance of truth. Stories achieve that by providing images even for the unreal. For effective opening statements, you must shape jurors' beliefs through images that command jurors' **five senses**. If jurors can see it, hear it, smell it, taste it, and touch it, it's real. What's real is true. And everyone has a natural affinity for truth.

Conveying reality is particularly important in this very first stage of trial. Memories of jurors (which, throughout this essay, include trial judges when they are the finders of fact) are likely to forever be embedded in the first impressions they receive. The important requirement of **primacy** is thus served, because every juror begins with a clean slate—an absence of preconceived knowledge—so that what they first learn often endures as their final belief.

Unlike closing arguments, this stage of a trial invites you to etch new information on each juror's previously clean slate. To best provide fresh information, you must be a **reporter**—one who relates what has been learned. The analogy is appropriate. When a reporter—in contrast to one who provides opinions, such as an editor or a columnist or a commentator—tells us of unfamiliar places and events, we are unable to reject what is conveyed because we have no or limited knowledge relevant to the location and imparted information. That absence of knowledge applies also to the first things jurors learn in a trial's opening statements.

To take advantage of that first opportunity, you must give the jurors reality shaped by the word-pictures that create true images. If jurors' five senses are induced by what you describe, they cannot reject those images. They may even place themselves in the action through the images you provide—and not by your improper invitation—as the victim of the rape, or the shooting, or the robbery; as the person who was injured because of someone's negligence or indifference; as the person who was defrauded, and whose trust was violated; as the person whose reputation is in shambles; as the person who is near bankruptcy because of a breached contract.

Where jurors are presented only random facts and data, experiencing reality is unlikely. Using facts and data to create a story—one that jurors capture and etch with their five senses—offers the pathway to truth.

To secure jurors' interest in previewing what is to come, you need to hit the ground running. That's particularly true in *total* storytelling, where, as the first to speak as a prosecutor or for the plaintiff, you should not waste time telling jurors that your opening statements give you an opportunity to provide an overview of what the evidence will show, and to guide them through future trial procedures. In some instances, especially when you don't engage in total storytelling, that may be a perfectly fine way to garner juror appreciation.

In total storytelling, however, leave those informative statements to the judge or opposing counsel. Telling a persuasive story requires opposing counsel, who may have nothing of substance to offer, to try to reduce the impact of your statements by informing jurors that what you said is not evidence, but merely your opinion of what the evidence will show. But, where opposing attorneys do have something to say, they are likely to challenge your version of the story, and even offer their own version.

If only one side delivers persuasive opening statements, that side starts with an advantage that may never be overcome. But don't be concerned if both sides offer persuasive statements. In that case, the jury will note the differences and pay special attention to the forthcoming evidence that supports each party's statements. This applies also in bench trials, where judges appreciate opening statements for providing an understanding of the case and the parties' differences, thus allowing focus on what really matters during evidence presentation.

In starting strong, some believe that every story should begin with something like, "It was a dark and stormy night."

IF ONLY ONE SIDE DELIVERS PERSUASIVE OPENING STATEMENTS, THAT SIDE STARTS WITH AN ADVANTAGE THAT MAY NEVER BE OVERCOME. BUT DON'T BE CONCERNED IF BOTH SIDES OFFER PERSUASIVE STATEMENTS. IN THAT CASE, THE JURY WILL NOTE THE DIFFERENCES AND PAY SPECIAL ATTENTION TO THE FORTHCOMING EVIDENCE THAT SUPPORTS EACH PARTY'S STATEMENTS.

Although we may pay homage to that cliché, it's merely an example for starting with words that draw interest. Try to summarize what the case is about in your very first sentence.

A good start for a plaintiff's attorney may begin with, "This is a case about a boy who will never walk again."

A good start for a prosecutor may begin with appropriate gestures and words such as: "'Put all your paper money in this bag or you're a dead man,' this armed defendant shouted seconds before he clutched the treasured bag of money he demanded and needlessly pulled the trigger of the gun that killed John Doe."

Then, having succinctly stated what the case is about and having drawn the emotion and attention of the jury, you must keep the momentum going by painting the images that capture the reality of what happened and the identity of the person responsible.

Of course, where defense attorneys have a good theory supported by persuasive evidence, they should begin with a compelling statement, and follow up by pointing out the inadequacy of the other side's evidence, while sharing their version of the reality underlying the case.

To provide students the rules I've already stressed, and to set examples for even more, I invariably have given

students another example of a total story in opening statements:

> It was a perfect spring day—May 15 of last year.
>
> After a good-night's sleep, Jimmy Jones was awakened by his radio alarm clock. He brushed his teeth, showered, dressed, and—as was his custom—read a few more pages of the book he had been reading. He then joined his father, mother, and sister at the breakfast table, sharing with them interesting information he had just learned.
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> Jimmy's 14th birthday was a week away. He was an A student in his eighth-grade class. He loved sports. He played golf with his father, and tennis with friends and members of his family. He played shortstop on his Little League team. He was the captain of his school's basketball team, where he played point guard and led his team in scoring.
>
> Jimmy was the first to leave the breakfast table that day. He hugged and kissed each member of his family, and he told his sister that, this afternoon, he would give her another chance to win her first basketball contest of HORSE. As he left to walk the two blocks to school, his mother watched as he went down the front stairs, with his books in his backpack, and turned left to head toward Main Street. It was the last time she was to see him walking.
>
> When Jimmy arrived at Main Street, he waited for the light to turn green. When the light changed, he stepped off the curb and started to cross the street ….

It's likely Jimmy was struck by a car that drove through the red light. But for the anticipated civil lawsuit, it's unknown whether he suffered death or injuries. But that's irrelevant for this exercise.

What's relevant is the story. By drawing images through word-pictures, I described a special boy with a loving family and a promising future, one that set the stage for a terrible outcome not possibly marked by challenging weather or misconduct by Jimmy. And in this *total* storytelling, I never used lawyer-talk. I didn't once refer to words like "I submit …," what a witness would say, or what the evidence will show. I just told a story—without saying such things as his principal will tell you (or testify) that Jimmy was an A student, and his coaches will tell you he was skilled in basketball and baseball, and his father will tell you how he enjoyed the game of golf. And after Jimmy stepped off the curb when the light turned green, I wouldn't say that Mr. Doe and Ms. Smith will testify that they saw the light was green for Jimmy and red for the defendant.

In total storytelling, I wouldn't tell the jurors those things because telling the factfinders a realistic story through facts that create vibrant images is superior to telling the jurors about witness testimony or what the evidence will show. I wouldn't say those things because they soften the narrative and they invite jurors' doubts. Jurors may think: "That may be what the witness will say (or what the evidence will show), but what really happened?" Or, "I want to see and hear these people—especially on cross-examination—to determine whether they experienced what they claimed to have experienced and to judge if they are trustworthy." Conveying images without needless attribution avoids the possibility of such doubts.

Storytelling when not telling an entire story

Thus far, I have given two examples of telling a persuasive *total* story in opening statements. But storytelling applies also to opening statements that contain partial storytelling. In most criminal cases and in some civil cases such as those involving death or great bodily harm, total storytelling may work well because they evoke emotion and provide tangible images that evoke reality.

In many cases, however, telling a total story may not be effective. But even in those situations where storytelling does not represent the entirety of the opening statements, some storytelling and some show-and-tell are essential.

I acknowledge that, in almost all instances, *total* storytelling is not the norm. And I also acknowledge that most attorneys successfully apply the techniques I previously criticized when total storytelling is used. I recognize that, in partial storytelling, the statements I criticized may create a positive bond between attorney and jurors. You must determine how and when to use storytelling. My dwelling on their importance in opening statements has been to provide relevant examples and to demonstrate that even nontotal storytelling in opening statements must be accompanied by producing the essence of prior occurrences through the storytelling portions that create reality.

As in all aspects of a trial, never do anything that might appear artificial to the jury. Such manifestations guarantee failure. You must determine before trial what approach works best for you and your case, and how the jury will respond to your presentation. Though I've focused on statements of prosecutors and plaintiff's attorneys, defense attorneys also need to determine the best tact for their opening statements.

In criminal cases, defense attorneys rarely disclose their trial strategy. Whether they offer defense information or not, they certainly will stress the defendant's presumption of innocence and that the defendant has no burden of proof because the entire burden of proof is solely on the prosecutor, who must meet the high burden of proving guilt beyond a reasonable doubt. Where defense attorneys do not provide information, they will no doubt stress that the prosecutor's statements are only what the prosecutor thinks the evidence will show, that it is not evidence, and that jurors should pay special attention to cross-examination-based answers from the prosecutor's witnesses. And they might focus on portions of what the prosecutor told the jury if they feel those portions are vulnerable to counterevidence. But when defense counsel feel their position is strong, they might disclose it and even provide a persuasive story of their own.

In civil cases, where the burden of proof for plaintiff's attorneys is not as high as that of a prosecutor in a criminal case, there is a usual tendency for defense counsel to offer the defendant's version of the facts—perhaps through counter-storytelling or simply through highlighting differences. This is particularly true where the defendant has

a strong and plausible version of events and the law. Of course, where a defendant in a civil case does not have a persuasive version to counter the plaintiff's lesser burden of proof, defense counsel should consider whether a negotiated resolution is in order.

Part Two of this series, concerning opening statements and the elements of persuasion, will appear in the November Illinois Bar Journal.