

Dynamic Opening Statements

How to Establish Credibility and Persuade From the Beginning

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Persuade From the Beginning

Never Underestimate the Power of First Impressions

- Studies show that 80% of jurors make up their mind during opening statement;
- One jury consultant said 85-90% of jurors don't change their decision after opening statement and the conclusion of the trial.
- WHY? Jurors subconsciously make up their minds about credibility and their view of evidence in opening statement.
- POINT: Persuade and Gain Credibility. You can Persuade without Arguing.

Persuade

1 Goal of Opening

- Don't waste time – Tell them why you win in simple terms from the first words.
 - Rule and Theme/Story
- Why? Juror's thought process goes in two distinct phases the *framing* and *scrutinizing* phase. The juror is still open to new ideas during this framing phase.
- Point: The goal during this first framing phase is to determine “what is this case about” in a manner that persuades?”

Preconceived Notions

- Juror Bias is the largest thing we have to overcome in my opinion.
- Many jurors have preconceived notions about lawsuits, lawyers, our clients, and our positions before we ever get started
- We are unlikely to change these preconceived notions in the course of a trial
- We must adopt the notions as our own

Persuasion Methods During Framing Phase

- THERE IS NO REPLACEMENT FOR STRONG ORAL ADVOCACY
- Ways to support oral advocacy
 - Pictures
 - Graphs
 - Statistics
 - Video
 - Learned Treatises
 - Simple Text
 - Power Point/ Trial Presentation Software

Persuasion on Liability During Opening of Trucking Case

- Set out the rule
 - A driver cannot make a left hand turn from the middle lane. Especially without knowing what is to his left. If he does and injures someone he is responsible for the harm under Alabama law.
- Give them your theme
- Tell the story
- Tell who is responsible and why
- Tell What is wrong with their opponents position

THE RULE

Violation of Alabama Rules of Road Negligence Per Se

- The driver of a vehicle intending to turn **shall** do so as follows:
- (2) **Left Turns**. The driver of a vehicle intending to turn left **shall approach the turn in the extreme left-hand lane available lawfully available to traffic moving in the direction of travel of such vehicle.**

The Theme

- A theme is a movie trailer. It is your case in 10 or fewer words that are constantly replayed throughout the trial.
- Establish the theme in opening statement

The Story
The Collision
Deposition of Party Opponent

- Q. So instead of staying in the left-hand lane, you stayed in the center lane?
- A. Uh-huh.
- Q. To make that turn?
- A. Yes, sir.

The Story

Party Opponent Story Changes



Who is Responsible

Tell why you win

- Tell the jury in clear and concise language why your client should win the case.

Addressing The Other Side's Position

Kenneth Mills Explains The Violation

- Q. Was there a reason why you remained in the center lane rather than getting into the left-hand lane of these three lanes?
- A. Yes, sir.
- Q. What was that?
- A. See this power pole right here....
- Q. Uh-huh.
- A. **You can't make that turn from right here...**

What is Wrong with Their Defense

The Left Turn Can And Is Made



Establish Credibility

#2 Goal

- Build Credibility by Creating ACCOUNTABILITY.
- WHY? Jurors are more likely to believe you if you ask them to hold you accountable for what you say
- PRACTICE POINT: Make Lots of Promises
 - AGREE WE LOSE IF WE CAN'T UPHOLD PROMISES
 - Who is your client
 - What evidence will show
 - What law will say
 - What will happen during course of trial
 - Be honest and don't exaggerate at all costs
 - With weakness
 - Have support for everything. They don't believe us.

Factors that Decide the Outcome

Order of Importance

- 1) Do the jurors like the client?
 - 2) Do the jurors like the lawyers?
 - 3) The facts of the case
-
- This makes it extremely important that we emphasize credibility for our client and ourselves

Scrutiny Phase

- After the issues are framed for the juror, the juror enters the scrutiny phase of thinking.
- By the time the juror gets to this point, they have a good idea about what the case is about. They are now searching for who to believe. They are scrutinizing what they have been told.
- Credibility is critical. Intentional steps should be taken to establish that credibility during the opening.

Damages During Opening

- As a Plaintiff, I think it is a mistake to wait till the end of the trial to discuss damages. The jury should know and be prepared for what they will be asked to do.
- As a Defendant, I would consider letting the jury know that the Plaintiff is going to ask them for money for something that couldn't be avoided or wasn't the defendant's fault.

Don't Hold Back

- Because your goal is persuasion, you should take full advantage of this window of opportunity and present your best evidence to the jury.
 - Key documents, testimony, testing, etc.
- Jurors have not yet fully framed or scrutinized the issues during opening.
- It may be too late if you hold back a key piece of evidence hoping to ambush the opposing party during trial. You could win the battle but lose the war.
- The jury may not be persuaded by a key piece of evidence if they have already made up their mind.
- Once a jurors mind is made up, they begin listening for evidence that supports that opinion. They have become closed minded to change with few exceptions.

Be Organized

- Try not to skip around between unrelated points. Organize your opening in a way that is easy to follow.
- I'm not saying memorize your opening, but practice it in advance. This will help you know in advance what you want to say and what issues you need to explain better or differently.
- Ask someone to listen to it when you practice.
 - What was the case about?
 - Did you not understand anything I was saying?
 - What was my strongest point?
 - Did you find anything difficult to believe?

Use an Outline

- Nutshell (Rule and Theme)
- Introduction
- My Promise
- Their Promise
- Your Client's Story
- The Opponents Story
- Damages
- Burden
- Wrap Up by Going back to your promises

Nutshell

part one

- Incorporate the rule you believe the jury should use to decide the case.
- The rule should be something the opposing side has or will agree upon
 - Examples
 - A manufacturer has a responsibility under the law to make a seatbelt that protects people and does not cause injury.
 - Examples
 - A driver has a responsibility to use care to protect himself while driving

Nutshell

part two

- Tell what this case is about in way that persuades
- Jurors are still in framing phase of thinking

This case is about.....

Introduction

- Introduce yourself and then your client

My Promise

- Start with an explanation of opening statement
- Give your promises
 - liability,
 - causation,
 - their position
 - damages
- Tell them to hold you to your promises

Their Promise

- Ask for the jurors to do what they are obligated to do

Tell the Story

- Be creative
- Incorporate visual evidence, but don't have visual evidence for every point, jurors still expect a good oral explanation
- Mix they types of visual evidence. Use boards and PowerPoints

Garvey
info
WF

Date November 18, 1976
Subject Belt Restraints
To N. Feles
Fisher Body

Date November 18, 1976
Subject Belt Restraints
To N. Feles
Fisher Body

At the Automotive Safety Subcommittee meeting of November 4, 1976, Lou Garvey presented the Fisher Body belt comfort and convenience work presently underway. Mr. Lundstrom has read Lou Garvey's presentation and has asked several questions which I would like to pass along to you for your response. In addition to the three criticisms of the single loop belt system which Mr. Garvey listed (that the system is difficult to reach, latch plate hard to slide and the window shade encourages excessive slack), we believe there are at least three other areas of concern well known to drivers using this system:

1. The belt tab on the buckle is too short.
2. The belt twists and jams in both the latch plate and the door post guide.
3. The window shade can result in excessive slack.

I would appreciate your comments of any changes Fisher Body contemplates to...
that Fisher Body...
occurrences...
tension relief...
reaction to t...

3. The window shade can result in excessive slack.

Mr. Campbell of your staff recently requested ASE to examine the possibility of a petition to amend MVSS 208 to reduce the 6 inch belt junction-to-occupant centerline distance to permit a longer tab length. ASE is developing a separate response to this request which will be distributed to you in the near future.

Mr. Garvey in his presentation also indicated that it was the Fisher Body position that the present B-C belt system is the most convenient system on the market. If Fisher Body has data to support this point we would appreciate an opportunity to review it.

Plaintiff's Exhibit
24

CF(C)0737

The Story

Try and Include a Key Admission in Visuals

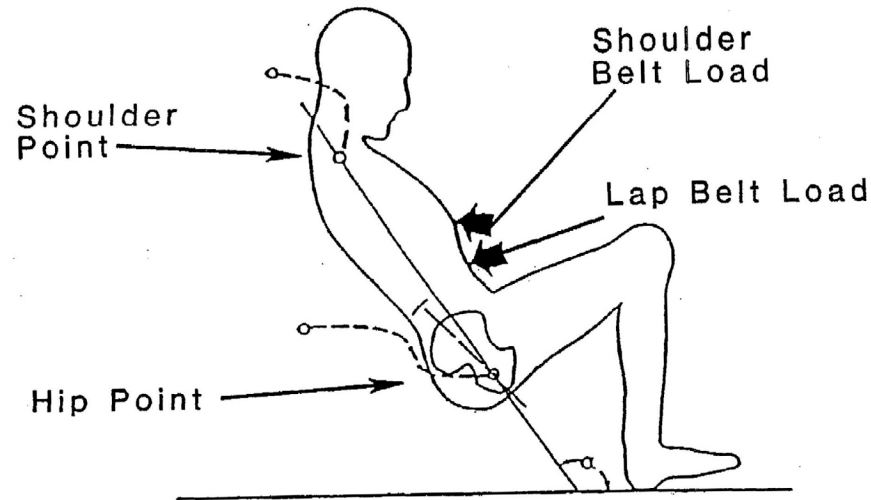


Opponents Story

- Need to address the what the other side has said or is going to say
- The jurors are framing your issues as well as theirs
- Don't run from your weaknesses. Acknowledge them and explain why they shouldn't decide the outcome
- Use your best evidence against their strong points

Opponents Story

BRTE8810280034



VERY POOR PERFORMANCE

- Classical submarining
- Loads lower thorax
- Loads abdomen above pelvis

/SWR/
/10-7-88/

SIMMONS00004262

PRODUCED BY GENERAL MOTORS IN SIMMONS V GMC

PRODUCED PURSUANT TO PROTECTIVE ORDER

Damages

- Go through key portions of damages and causation testimony that is favorable to your client
- If there is strong testimony consider playing a clip of the video or using a blow up
- If you represent the plaintiff:
 - Talk about the effect of the damages on your client;
 - Talk about the purpose of the damages you are requesting (compensatory or punitive);
 - Warm the jury up for an amount you intend to request

Burden of Proof

- Explain the burden of proof
- “If I uphold my promises....”

Wrap Up

- I promised to show you that this seatbelt was defective, that defects caused these injuries and that my client will never be the same again.
- You promised to listen to all the evidence and be fair and impartial.
- If I do my job and you do your job, and I know we will, then confident justice will be done and I'll ask you to return a verdict in favor of my client.