

The Journal of the Section of Litigation

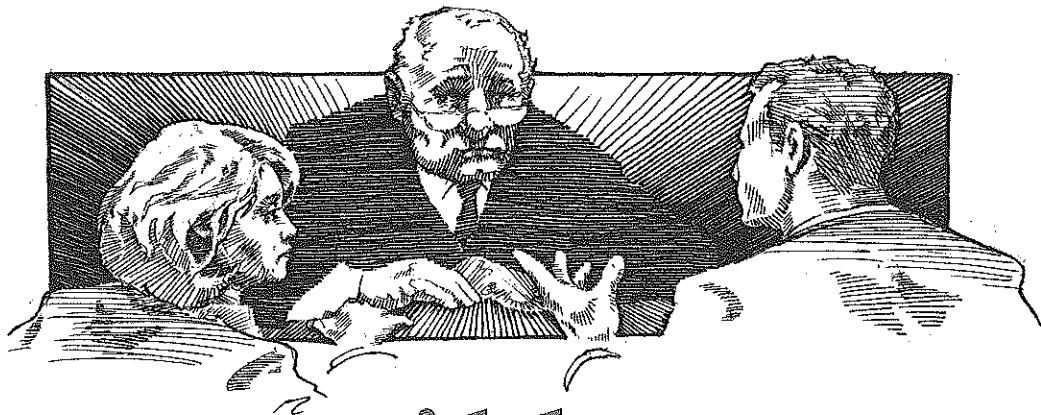
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Sidebar

Opening Statement

by **Kenneth P. Nolan**
Senior Editor

A skeptical jury awaits. Citizens, bored and a touch angry, sit silently as the judge drones on. They glance around the dreary courtroom, at the fallow walls, the cynical clerk, the few spectators. They want to connect the bits and pieces heard in jury selection. They want action, suspense, like in the movies.

Then the judge peers over her glasses, mumbles your name and other words you don't hear because your mind is racing, hands trembling. You jerk your head from your notes, breathe deeply, and suddenly you're focused. You stand, thank the court, nod at your adversaries, stride to the podium, place your papers, and pause. All eyes focus, and with a slight smile, you look those calloused jurors in the eye and with a clear, crisp voice begin.

It's time to tell your story—be thorough and logical, detail the facts, touch on the law, persuade the array that you should and will win. After all, studies show juries decide immediately after opening, so if you flub it, confuse, hesitate, are not convincing—you'll lose them and the case.

The opening is what you've been anticipating. An opportunity to teach, explain, introduce your client and case, describe the suffering, appeal to the jury's intelligence and sense of fairness, and tug, just a little, on their emotions. To argue in such a reasoned, compelling manner that the case is over before the dopey defendants' attorneys utter a word.

It sounds easy, simple perhaps. After all, you were the star on the debate team in high school, and last week at O'Sullivan's Pub, everyone roared as you told joke after joke. Now, however, this is for real, what you get paid for. Not to come in second or to do a good job, but to win. This isn't soccer or basketball where everyone plays and they don't keep score. Did you have fun, Kathy? That's all that counts. It doesn't matter if you win or lose as long as you had a good time.

Sure your parents meant well, but they grew up before 9/11, when everyone and everything was goodness and purity. There's no more "it's how you played the game" crap. You lose and your partners, client, spouse are livid. You spent how long and how much money? And you got zilch? Or the jury awarded that sleazy plaintiff more than the total bail-out package? How come you didn't settle? Are we going to lose the client and its billings? What the F happened, as my angelic daughter would snap.

I don't know when jurors decide. It's probably a roller coaster—one day you favor the plaintiff, the next the defendant. You may not win the case on opening,

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but you sure as heck don't want to lose it then. It's hard to run uphill, to realize your adversary connected, was thorough, knowledgeable, and convincing. Sure, the case is obvious, the facts simple, the law rudimentary. A grubby appeal to their emotions: They can't throw the widow, the maimed ironworker out without a sou. Slam dunk, right. Let the defendant try to explain away the negligence, the death, the tragedy. No way. Then it happens, and your smirk freezes, you nervously reach for water and quietly curse your silly arrogance, your laziness. Get your butt in gear or you'll be having nightmares for a decade if this easy one goes down the tubes.

Prepare. Obvious, of course. But thoroughly and frequently. Have a written outline detailing all the points you wish to emphasize. Keep your notes on the podium, in your hand, somewhere close so that if you hesitate or freeze, you can glance down and resume your argument. If you cite a specific regulation, document, or e-mail, write it word for word and don't be afraid to read it so you don't screw up. Incorporate language from the probable jury charge in your argument, but have it in writing so you can use the exact language and don't transpose words like our "I'm *Harvard Law Review* so I don't need notes" Chief Justice Roberts did at the swearing-in.

Sure, I'd like to open without notes and be as charming as Reagan or inspire like Barack, but I'm me—on occasion

eloquent but mostly mediocre. And I can't remember what I had for breakfast, so I drag my notes with me, like a legal security blanket. Jurors are interested in information. This isn't Olympic figure skating where you win points for style. Get the job done. Don't forget anything. Winning ugly is better than losing beautiful.

Don't write every word and read it unless you're hopelessly inept. Have some spontaneity. If you simply stand at the podium and read in a monotone, you'll lose the jury and your message.

Practice. Hire the mock jury guys and have them critique your work. Videotape your performance. You'll be surprised what you learn. The opening is the one part of the trial where you can predict what you'll say, especially if you're the plaintiff. Even defendants will know 95 percent of what they'll say. If you can't afford jury consultants, practice in front of the mirror, your assistant, partners,

associates, anyone. Listen to criticism but not to the patronizing gray hair who wants to change every word because back in '78, he had a trial and did it this way. It's your case. Think Sinatra: Do it your way.

When you practice, make sure the listener follows your argument. Periodically stop and ask your listener to summarize what was just said. A polished opening that no one understands is worthless. Years ago, a trial practice guru actually tried a case and kept using the phrase "red herring" in his opening. There was only one problem: No juror knew its meaning. What is obvious to you is not so to the ordinary stiff brown-bagging to work every day. But jurors know phonies, and speaking over their heads raises that possibility. And everyone hates phonies. Ask Holden Caulfield.

Use simple language. We watch the Super Bowl and *American Idol*, Oprah, and *Dancing with the Stars*; we read

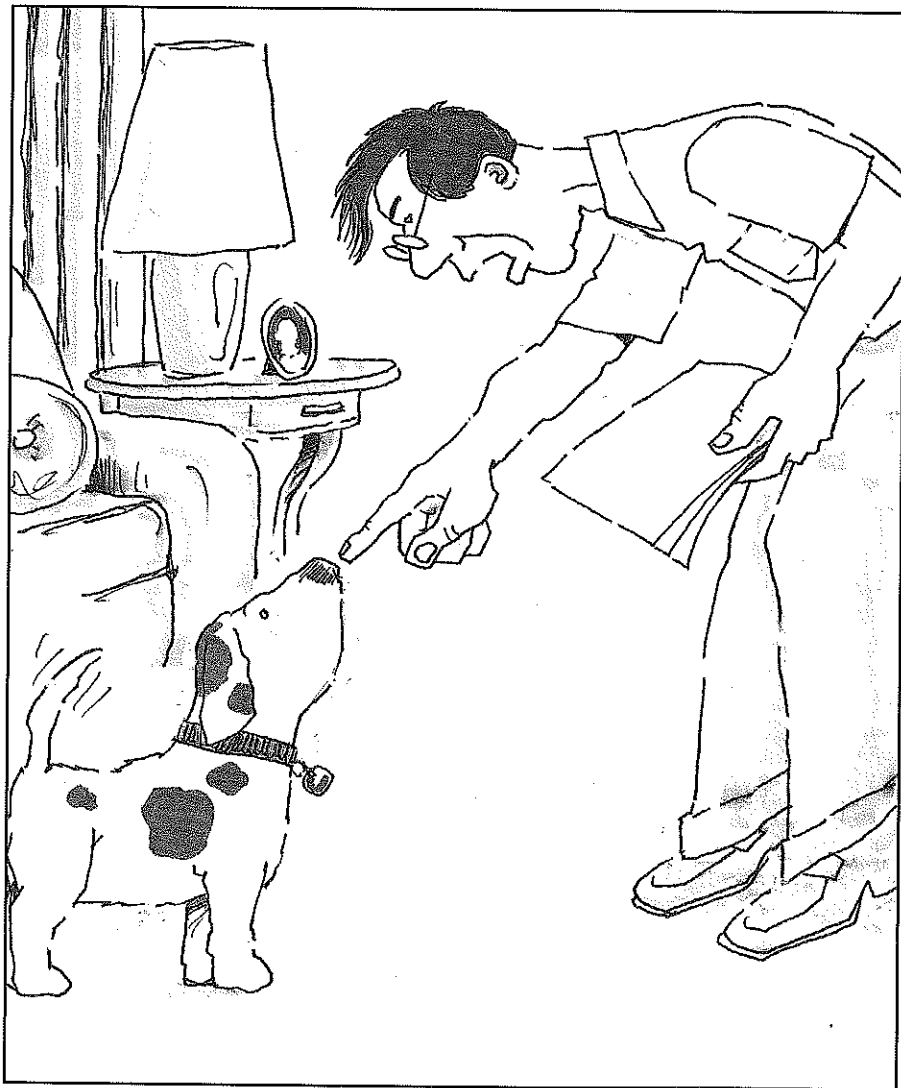
tabloids and *People*; obsess over Angelina and Brad. So save the Shakespearean references, the vocabulary words learned while cramming for the Scholastic Aptitude Tests. And no one believes that you really love the History Channel while knowing everything about the latest *Project Runway* episode.

You're dealing with honest, good people who are proud, yet hate, just despise, those haughty, condescending types who know more and just have to flaunt it. You have more formal education, but that doesn't mean you're smarter. I never saw a course in street smarts on any college or law school curriculum. And those masters of the universe with their MBAs from Wharton and Columbia turned out to be pretty dumb as they ran our financial institutions into oblivion.

Stop using "prior," or "subsequent," for example. Speak to jurors in the same manner you wish to be addressed. Before Brooklyn became hip (alas), I could tell that those Manhattan or suburban denizens really didn't mean "That's nice," when I told them where I live. Their demeanor and tone shouted, "Why would anyone live in Brooklyn with the gum-chewing bridge and tunnel crowd?" And I'm sure you've had the same experience whether from a pompous senior partner, a sneering classmate, or someone you met at a cocktail reception. The kind that holds the wine glass by the stem, asks where you summer or, my fav, who peers over your head to find someone important as they shake your hand.

Explain. Whether a simple auto case or a complicated product liability matter, educate the jury. Explain the product, the behavior, the documents so they can visualize what occurred. Not easy when dealing with complex business contracts, the design of a truck, or technical language, be it medical, securities related, or complex credit default swaps.

Take your time and detail the facts and subject thoroughly. In a medical malpractice case that I expected the defendant to settle, I rushed my opening, leaving it to the experts to explain the complicated surgical procedure. I touched on what happened when a wall within the heart was perforated, but I really didn't explain the process, instruments, and standard of care except



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to trumpet the doctor's negligence and how my sainted client nearly died.

Defense counsel took twice as long, deftly detailing the events from the moment my client entered the hospital until he left, discussing the inherent danger in such an operation, showing the jury the instruments, letting them touch the tube placed into an artery, arguing that, yeah, it happened, but this procedure was so delicate and the plaintiff's heart in such bad condition that it was a known risk. We did the best we could, and now we're here and Mr. Nolan says terrible mistruths about my diligent doctor who saved the plaintiff's life.

I sat enthralled and learned along with the jury. Even though I won the case—I would love to tell you it was my world-class ability, but the case was tried in the blessed Bronx, an extremely friendly plaintiff venue—I learned always to be thorough and to make sure the jury is educated from my lips rather than my adversary's.

Argue. The plaintiff has to tell the jury what he will prove. "The evidence will prove . . ." And what he wants. "At the end of this trial, I want you to give a verdict for Mrs. Clark and award her money damages . . ." Don't be shy. If you want a boatload of dough, tell them. You don't have to use numbers, but make sure they understand you will be asking for more than they'll ever make in five lifetimes.

If you want the jury to toss the pathetic plaintiff and his wheelchair into the middle of Court Street, tell them. If the plaintiff was fired because he was a lazy, incompetent bum and not because of his race, religion, or sex, shout it. In a refined way, of course. If you don't, they may never know. Don't wait until closing. It may be too late.

If your theme is that the defendant was told a million times that the product was dangerous, repeat it during opening. If you have evidence that the plaintiff is a malingerer, sing that chorus constantly. Stare at the jurors when you state that you will prove your case, sustain your burden, making sure they understand it's not "beyond a reasonable doubt," which is all they've ever heard. Do it without theatrics or hyperbole. Do it professionally, convincingly. The

defendant should appeal to the jurors' courage, fairness, and common sense in peeking around and through the horrible injuries. American justice demands you award the plaintiff nothing. Enter judgment for my client, Exxon, because even large corporations that make billions and employ thousands deserve the same fair shake as you and me and all Americans.

Judges usually limit emotional displays—Save it for closing, counselor—so you may have to seek a middle ground between swinging from the chandeliers and a boring soliloquy that has the jury snoring after 15 minutes.

Use demonstrative evidence. PowerPoint slides, videos, photos. Show the crucial evidence to the jury so your words are supported by signed letters, handwritten notes, or e-mails. Use a media consultant if you don't know how to post a photo on your Facebook page. Young lawyers know this stuff, so have them prepare an inexpensive, effective computer presentation. Words are powerful, but pictures, video, seal the deal.

Keep your word. Nothing worse than vowing to prove this and that and then nothing. Note your adversary's promises, and if she doesn't deliver, dance with the lack of credibility at closing. In an auto case, defense counsel promised to prove three things, including bringing an expert to testify that my client's injuries were bogus. He failed on all three. First words in my closing: Remember last week during openings when Mr. Jones stood in front of this jury, before this honorable court and vowed to prove XYZ? I waited and waited, and then he rested. He said his proof was complete and never proved X or Y or Z. Nada, zilch. Oh, you can have fun with that one.

If you're unsure of your strategy, allow some wiggle room. Don't brag about what you'll do if you're uncertain whether it will occur.

Openings provide the jury with information and comprehension. You can orate, persuade, reveal eloquence and brilliance in hopes of laying the groundwork for success. Yet it's really a tiny skirmish in a much larger battle. Once completed, the grind begins with witnesses and exhibits and unexpected answers and constant headaches. Testimony, evidence wins trials. Yet, an effective opening provides clarity and rationale as to why you should win. Don't blow it. ☐