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Hit the Ground Running: The Complete Opening Statement Supported by Empirical Research and Illustrations

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HIT THE GROUND RUNNING: THE COMPLETE OPENING STATEMENT SUPPORTED BY EMPIRICAL RESEARCH AND ILLUSTRATIONS

Harry Mitchell Caldwell¹ & Deanne S. Elliot²

A. INTRODUCTION.....	173
B. GRAB THE JURY’S ATTENTION.....	174
1. Create a Theme.....	176
2. Develop a Thesis or Legal Theory.....	177
3. Illustrations of a Grab.....	178
a. Plaintiff Grab in a Wrongful Death Case.....	178
b. Defense Grab in a Wrongful Death Case.....	179
c. Prosecution Grab in a Domestic Violence Case.....	180
d. Defense Grab in a Domestic Violence Case.....	181
C. PERSONALIZE THE PARTIES.....	181
1. Make a Positive First Impression.....	182
2. Illustrations of Personalization.....	185
a. Personalization of Plaintiff in a Personal Injury Case.....	185
b. Personalization of a Corporate Defendant in a Wrongful Termination Case.....	186
D. TELL A STORY.....	187
1. Make It Interesting.....	188
a. Illustration: A Poor Example of a Defense Open in a Civil Trial.....	188
b. Illustration: A Poor Example of a Defense Open in a Criminal Trial.....	189
2. Strike the Proper Balance.....	190

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3.	Use a List.....	191
a.	Illustration: Defense List in a Wrongful Death Case.....	193
E.	PRICK BOILS.....	193
1.	Inoculate the Jury.....	194
2.	Enhance Advocate and Party Credibility.....	197
3.	Illustrations of Boil Pricking.....	199
a.	Defense Inoculation of a Prior Conviction in a Criminal Case.....	199
b.	Plaintiff Inoculation in a Civil Case.....	200
F.	END STRONG.....	201
1.	Illustration: Plaintiff Conclusion in a Personal Injury Case.....	201
G.	FOLLOW ADVOCACY PRINCIPLES.....	202
1.	Anticipate Opponent's Claims and Respond Appropriately.....	202
a.	Plaintiff/Prosecution Must Foresee and Preempt Defense Claims.....	202
b.	Defense Counsel Must Respond to and Deflect Plaintiff's Assertions.....	203
c.	Illustration: Defense Response to Plaintiff's Assertions.....	203
2.	Use Horizontal Dialogue.....	204
3.	Develop Sound Bites.....	205
a.	Illustration: Spence's Memorable Soundbite from <i>The Estate of Karen Silkwood v. Kerr-McGee</i>	206
4.	Don't Make Promises You Can't Keep.....	207
a.	Illustration: Defense Attack on Prosecution's False Promise During Closing Argument.....	207
5.	Use Appropriate Technology.....	208
6.	Don't Argue.....	208
H.	CONCLUSION.....	209

*"The beginning is the most important part of any work, especially in the case of a young and tender thing; for that is the time at which the character is being formed and the desired impression is more readily taken."*³

Plato, *The Republic*

³ Plato, *The Republic*, Book II (Benjamin Jowett trans.), <http://classics.mit.edu/Plato/republic.3.ii.html> (last visited Oct. 31, 2018).

A. INTRODUCTION

The opening statement is the window into an advocate's case.⁴ A properly executed opening statements stages the advocate's entire case by grabbing the jury's attention,⁵ setting forth a succinct thesis and theme,⁶ articulating a compelling sense of right and wrong,⁷ personalizing the client,⁸ mitigating problematic evidence,⁹ offering a coherent and compelling story of why the client should win,¹⁰ and ending strong.¹¹ During opening statements, jurors form impressions of the advocates, the parties, and which side they favor.¹² These first impressions harden like cement and heavily influence everything that follows.¹³ Indeed, many jurors reach at least a

⁴ See *Hooks v. Workman*, 606 F.3d 715, 730 (10th Cir. 2010) (noting that an opening statement's narrow purpose is to inform the jury); 3A NICHOLS ILLINOIS CIVIL PRACTICE § 56:7 (2018) (emphasizing that the jury's first "window" of the case is the opening statement); HARRY P. CARROLL & WILLIAM C. FLANAGAN, 43A TRIAL PRACTICE § 11:2 (3d ed. 2018) (indicating that for most jurors the window of opportunity only lasts through the opening statement).

⁵ See Matthew J. O'Connor & Nicholas B. Schopp, *Opening Statement Restriction Lifted? Are the Scales of Justice Tipping Back to Even After State v. Thompson?*, 58 J. MO. B. 35, 37 (2002) (indicating that jurors are more likely to remember concepts when they are in a novel situation and when attention is heightened).

⁶ See Edward J. Imwinkelried, *The Development of Professional Judgment in Law School Litigation Courses: The Concepts of Trial Theory and Theme*, 39 VAND. L. REV. 59, 61-64 (1986) (noting that a succinct theory or thesis helps the advocate simplify the trial for the jury, and that a theme encapsulates the advocates strongest argument for why they should win).

⁷ See Thomas A. Demetrio, *Opening Statement: Some Initial Thoughts and Bullet Points*, 13 CHI. B. ASS'N REC. 40, 40 (1999) (noting that the opening statement should be a "clear, convincing, confident, powerful and concise rendition of your case" such that the jury is prepared to reach the conclusion "that your client is on the right side of the controversy").

⁸ See Mark W. Klingensmith, *Opening Statement*, in FLA. CIV. TRIAL PRAC. § 8.2 (11th ed. 2017) (emphasizing the importance of personalizing the client in opening statements by helping the jury identify with them).

⁹ See Martha Neil, *7 Tips for Winning Opening Statements; Among Them: Tell a Story, Focused on Key Facts*, A.B.A. (Nov. 16, 2011), http://www.abajournal.com/news/article/7_tips_for_winning_opening_statements_among_them_tell_a_story_focused_on_key_facts (noting that bad facts must be accounted for in an opening statement and that the opening statement should establish a theory of the case that accommodates the bad facts).

¹⁰ See Allison Wood, *Opening Statement*, 17 CHI. B. ASS'N REC. 48, 48 (2003) (noting that a winning opening statement has "an identifiable theory surrounded by a compelling story that is confidently delivered").

¹¹ See Demetrio, *supra* note 7, at 42.

¹² See DOMINIC J. GIANNA & LISA A. MARCY, *OPENING STATEMENTS: WINNING IN THE BEGINNING BY WINNING THE BEGINNING* § 7:3 (2017) (indicating that advocates must reach the hearts and minds of jurors in opening statements).

¹³ See Jim M. Perdue, *The Importance of the Opening Statement*, in 3 LITIGATING TORT CASES § 37:5 (2018) (referencing studies that suggest that 80% of jurors' opinions reached during opening statements do not change after hearing evidence).

tentative verdict following opening statements.¹⁴ The importance of the opening statement is remarkable given that the jurors have yet to hear from a single witness or consider a single piece of evidence.¹⁵ Without an effective opening statement, the jurors are left adrift without sufficient context to fully appreciate and understand the testimony and other evidence as it is developed during examinations.¹⁶ And yet, for many trial lawyers opening statements are a bit of an afterthought, thrown over in favor of witness preparation and developing trial strategy.¹⁷ Such myopia is a missed—and perhaps fatal—opportunity to favorably shape the trial from the outset.¹⁸

This article will suggest a structure for opening statements, which consists of: (1) grabbing the jury's attention; (2) personalizing the client; (3) telling the story of events leading to trial from the client's perspective; (4) pricking any "boils" in the case to neutralize negative information; and (5) ending on a strong note. The effectiveness of each component is supported by research and is well-illustrated. Following examination of the structural components, this article will delve into the advocacy principles essential to a complete and successful opening statement.

B. GRAB THE JURY'S ATTENTION

There is only one chance to get something right the first time—including oral presentations.¹⁹ That first opportunity for a speaker to grab the attention of her audience must not be squandered.²⁰ The law of primacy

¹⁴ See Douglas Danner & Larry Varn, *Opening Statement and Closing Argument*, in 3 PATTERN DISCOVERY: PREMISES LIABILITY § 27:3 (3d ed. 2018) (noting that jurors often make decisions soon after they hear information about the case).

¹⁵ See MARGARET C. ROBERTS, TRIAL PSYCHOLOGY: COMMUNICATION AND PERSUASION IN THE COURT ROOM 23 (Butterworth Legal Publishers 1987). Primacy teaches that information presented first is more effectively recalled by the listener and heavily influences the listener's impression of everything that follows. *Id.*

¹⁶ See James R. Lucas, *Opening Statement*, 13 U. HAW. L. REV. 349, 350 (1991) (noting that opening statements give advocates the opportunity to provide a context for jurors to assimilate and integrate the evidence as trial proceeds).

¹⁷ See Michael J. Ahlen, *Opening Statements in Jury Trials: What are the Legal Limits?*, 71 N.D. L. REV. 701, 701 (1995) ("All good trial attorneys realize the importance of opening statements.").

¹⁸ See Klingensmith, *supra* note 8, § 8.1 (expressing that dispensing of an opening statement is the first step to losing a case).

¹⁹ See Peter Perlman, *The First Two Minutes of the Opening Statement*, 16 PRAC. LITIGATOR 23, 23-24 (2005) (noting that it is critical to make a good first impression during opening statements).

²⁰ See L. TIMOTHY PERRIN ET. AL., THE ART & SCIENCE OF TRIAL ADVOCACY 122-23 (California Academic Press 2d ed. 2011) ("The first moments of the opening should grab the

dictates that an audience begins making the decision (consciously or otherwise) to either remain engaged because their initial interest is piqued or to fade out with less than full attention.²¹ That decision could be made within the first few seconds of an advocate's case.²² The impressions formed from this first interaction with the jurors will subconsciously stay with them throughout the opening statement and into the trial.²³

Despite the unflinching reality of the import of primacy, many trial lawyers fail to take full advantage of this one-time opportunity to grab the attention of their jurors.²⁴ Indeed, the opening statement is not the time to thank the jurors for their service (that can and should come later) or to suggest an opening statement is like a roadmap or outline of the evidence to be produced at trial.²⁵ Such hackneyed approaches should have gone out with eight-track cassettes. Rather, opening is a time for creativity and bold statements to intrigue and entice the jurors to stay focused.²⁶

attention of the jurors and give them a preview of why they should conclude that the advocate and his client are in the right.”).

²¹ See *id.* at 22-23.

Primacy teaches that information presented first is more effectively recalled by the listener and heavily influences the listener's impression of everything that follows. At least two aspects of human nature are at work. First, during the first moments of a speech or presentation the interest of the audience is greatest. The audience will never be so attentive again. That attentiveness translates into better retention of the information later. Second is a matter of first impressions. Once formed, first impressions are nearly impossible to change.

Id.; MEMORY AND MIND: A Festschrift for Gordon H. Bower, 31 (Stephen M. Kosslyn et. al. eds., Taylor & Francis Group 1st ed. 2007) (“[F]irst encounters with new situations, people, events, objects, and facts have greater impact on subsequent thought and behavior than later encounters of similar kinds.”).

²² See Nicholas Rule, *Snap-Judgment Science*, OBSERVER (Apr. 30, 2014), <https://www.psychologicalscience.org/observer/snap-judgment-science> (emphasizing studies where participants made accurate decisions on snap judgments made within seconds); see also C. Neil Macrae & Galen V. Bodenhausen, *Social Cognition: Thinking Categorically about Others*, 51 ANN. REV. PSYCHOL. 93, 95 (2000); Alexander Todorov et. al., *Inferences of Competence from Faces Predict Election Outcomes*, 308 SCI. 1623, 1624 (2005) (finding that one second decisions were sufficient for subjects to assess competence of a candidate, and these assessments predicted the outcomes of actual elections).

²³ See Macrae & Bodenhausen, *supra* note 22, at 95-100.

²⁴ See J. ALEXANDER TANFORD, *THE TRIAL PROCESS: LAW, TACTICS AND ETHICS* 147 (2002) (“Too often, lawyers squander [the] opportunity to present their theory and highlight the pivotal evidence [during their opening statement].”).

²⁵ See *id.* at 147-49 (noting that if evidence is discussed in an opening statement, it should be key evidence); *infra* note 89 and accompanying text (explaining that many lawyers waste crucial moments when the jury develops their first impression by thanking the jury for their time and service).

²⁶ See JAMES A. LOWE & MARK L. WAKEFIELD, *AMERICAN LAW OF PRODUCTS LIABILITY* 3d § 70:90 (2019) (noting that opening statements can and should be creative and compelling);

The grab is only limited by an advocate's imagination. It may be a staccato recitation of key facts ("that man [pointing to the defendant] grabbed his gun, drove to the victim's home, and shot him dead").²⁷ It may be using a well-known quote,²⁸ emphasizing a key statement on which the trial turns,²⁹ or even reciting the theme of the case (i.e., "with great profits come great responsibilities").³⁰ Creating a grab is both a product of distillation and inspiration.³¹ Distillation in that advocates must thoroughly know their case in order to craft these first words that set the stage for all that follows. Inspiration is needed to find a theme that will establish the "rightness" of the client's case.

1. Create a Theme

The theme of every case should be more than simply why the party should win, it should also connect the jury to some reason why they should *care* about the party winning.³² The theme should play on accepted notions of right and wrong, and should speak to universal truths all people understand.³³ For instance, "putting profits over people" to describe a callous corporate defendant, or "a person's word is their bond" in a contentious contract case. Finding the right theme for each case can be challenging, but it need not be solely the product of the advocate's inspiration, it can be gleaned from outside sources. However, bear in mind the theme must speak to all the jurors. Pushback from even one or two jurors

Abraham P. Ordovery, *Persuasion and the Opening Statement*, 12 LITIG. 12, 12-14 (1986) (noting that opening statement should grab the jury's attention).

²⁷ See CARROLL & FLANAGAN, *supra* note 4, § 11:23 (explaining that some attorneys get directly to telling the client's story).

²⁸ See David J. Dempsey, *Content Counts*, 65 OR. ST. B. BULL. 33, 35 (2005) (noting that quotations increase your persuasiveness).

²⁹ See THOMAS L. OSBORNE, TRIAL HANDBOOK FOR KENTUCKY LAWYERS § 18:2 (2017) (noting that opening statements should orient the jury to key factual issues).

³⁰ See 2 FRED LANE, LANE GOLDSTEIN TRIAL TECHNIQUE § 10:24 (3d ed. 2018) (noting that the grab can be based on the theme of the case); 1 ADELE HEDGES & DANIEL K. HEDGES, TEXAS PRACTICE GUIDE: CIVIL TRIAL § 5:85 (2018) (expressing that an opening statement can effectively start with a dramatic beginning that grabs that jury's attention).

³¹ See *infra* note 41.

³² PERRIN ET. AL., *supra* note 20, at 25.

The central theme of every case should do more than simply tell the jury why the party should win, it should also connect the jury to some reason why they should care about the party winning. Logic and emotion must be tapped. Advocates must pay attention to the human element in their case, regardless of the particular facts involved.

Id.

³³ See CARROLL & FLANAGAN, *supra* note 4, § 11:18 (noting that a theme should regard the theory of the case and capture the fairness and justice of the client's position).

could (will) be costly. Once the right theme is realized, it will resonate throughout the trial, into closing argument, and into the jury deliberation room.

2. *Develop a Thesis or Legal Theory*

Perhaps the most crucial element of any opening statement is the ability to reduce the case to its absolute essence.³⁴ Indeed, the primary point or takeaway of any speech should be made very early and very clearly. If counsel is not able to state in a sentence or two why he should prevail, he is not prepared to go to trial. Without a focused thesis or case theory, the advocate lacks crucial understanding of what he must accomplish: ferreting out the essential from the non-essential.³⁵ As a result, the advocate runs the risk of the case becoming a scattered affair that will only succeed in confusing the jurors.³⁶ Furthermore, jurors sensing a lack of focus will cast doubt on the competence of the advocate and the legitimacy of his case.³⁷

The thesis should immediately follow the grab and focus precisely on what the advocate must prove to prevail.³⁸ A prosecution's or plaintiff's thesis statement should begin with "We will prove" A defense's thesis statement should likewise be bold and begin "The evidence will show"³⁹ The difference, of course, recognizes which side bears the burden of proof. The thesis statement should be delivered slowly and forcefully to maximize its importance.⁴⁰

³⁴ See PERRIN ET. AL., *supra* note 20, at 123 ("[T]he 'grab' should conclude with the advocate's thesis statement about the case, which tells the jury who should win and why."); *Differences Between Opening Statements & Closing Arguments*, U.S. CTS., <http://www.uscourts.gov/about-federal-courts/educational-resources/about-educational-outreach/activity-resources/differences> (last visited Oct. 31, 2018) (indicating that each party should set the basic scene for jurors during opening statements).

³⁵ See PERRIN ET. AL., *supra* note 20, at 37-38; George A. Googasian, *Opening Statements*, 92 MICH. B.J. 54, 54 (2013) (noting that a theory, or thesis that explains what happened and why is essential to the success of a case).

³⁶ See Googasian, *supra* note 35 (noting that a theme based on the theory of a case can shape juror perceptions of the relevant facts and events).

³⁷ See FRANCIS P. BENDEL ET. AL., *PERSONAL INJURY PRACTICE IN NEW YORK* § 9:215 (noting that a lack of confidence is harmful when attempting to persuade the trier of fact).

³⁸ See PERRIN ET. AL., *supra* note 20, at 123.

³⁹ 6 LINDA S. PIECZYNSKI, *CRIMINAL PRACTICE & PROCEDURE* § 26:15 (2d ed. 2018) (noting that the opening statement should acquaint the trier of fact with the evidence that the lawyer will introduce).

⁴⁰ *Contra* Gary S. Gildin, *Reality Programming Lessons for Twenty-First Century Trial Lawyering*, 31 STETSON L. REV. 61 (2001) (noting that speaking too slow may lose the jury's attention).

Prominent lawyer Theodore Olson, most noted for his masterful advocacy before the United States Supreme Court, explained how he arrives at a thesis statement: I try to develop a succinct summary of my argument in one or two sentences I employ several exercises to aid in developing the best distillation of my argument. My son . . . asked me about an upcoming argument: “Dad, what does it mean if you win?” That is what it is all about. Can you answer that question in a sentence or two? If not, you have probably not given your case the intense analysis required to make a cogent, persuasive argument.⁴¹

Even though Olson’s advice was directed to oral argument before an appellate court, the necessity of developing a succinct thesis applies equally to the opening statement in a jury trial.

Occasionally the thesis of the case is confused with theme. As discussed above, the thesis is the focused, fact-specific statement of why the advocate’s client will win, whereas the theme plays on accepted notions of right and wrong and is not necessarily case specific.⁴²

3. *Illustrations of a Grab*

a. Plaintiff Grab in a Wrongful Death Case

In a mock medical malpractice case a surgeon performed cardiac surgery in which the patient died.⁴³ The plaintiff’s grab may sound as follows:

Brenda Farrell is a widow, and her two children are fatherless. Why? Because that man (pointing to defendant), that doctor, was too arrogant to admit that he was too tired and too distracted to competently and safely perform heart

⁴¹ See Theodore B. Olson, *Ten Important Considerations for Supreme Court Advocacy*, A.B.A. (Apr. 20, 2018), https://www.americanbar.org/groups/litigation/publications/litigation_journal/2017-18/winter/ten-important-considerations-supreme-court-advocacy/.

⁴² See 1 BRUCE H. STERN & JEFFREY A. BROWN, *LITIGATING BRAIN INJURIES* § 7:2 (2018) (noting that an opening statement should be built around the thesis, which is the point of the party’s argument); see also Imwinkelried, *supra* note 6, at 61-63.

⁴³ See THOMAS F. GERAGHTY, FARRELL, ET. AL. V. STRONG LINE, INC., NITA MEMORIAL HOSPITAL, AND DR. MADDEN: ADVANCED CASE FILE (Nat’l Inst. For Trial Advoc. rev. 2d ed. 1994).

surgery on Brenda's husband, on Jon and Sara's dad. Ladies and gentlemen, we will prove that the defendant was in the midst of a particularly nasty divorce at the time of the surgery, and he was distracted and tired. In fact, he didn't sleep the night before the delicate and demanding heart surgery on Don Farrell. He didn't notice he had nicked Don's aorta. He didn't notice that nick would cause Don to bleed to death. Folks, you don't take risks with the lives of others.

Note the distillation of a likely complicated set of facts, derived from complex medical records and expert opinion. The grab served all the functions detailed above: laying out plaintiff's theme, the universal truth, that no one should take risks with the lives of others. It also laid out the thesis: plaintiff wins because the defendant fell below the standard of care when he operated on the decedent while tired and distracted.

b. Defense Grab in a Wrongful Death Case

The following illustration is based on a mock case involving the wrongful death of a firefighter who was killed while attempting to rescue a careless rock climber who fell during a climb.⁴⁴ Defense counsel is in a difficult position because he must challenge the conduct of a firefighter, a hero, who was killed trying to rescue the defendant, the fallen rock climber. The defense grab might sound like this:

Plaintiff's counsel is correct. We lost a hero the day firefighter Brown died. His death is a tragedy for all of us, and especially for his family. But there is a hard reality we must confront: even heroes must act reasonably. It is teamwork and discipline that sends firefighters out into dangerous situations, but it is also teamwork and attention to discipline that brings them home safely. Ladies and gentlemen, even firefighters must act reasonably. And unfortunately, the evidence will show that firefighter Brown died because he acted unreasonably.

Such a grab not only seizes the jurors' attention but also introduces the defense theme that even heroes, like all people, must act reasonably. This

⁴⁴ See FRANK D. ROTHSCHILD ET. AL., *BROWN V. BYRD: CASE FILE* (Nat'l Inst. for Trial Advoc. 2d ed. 2013).

aligns perfectly with the defense thesis: that the firefighter did not act reasonably, and the defense should prevail. In this grab, the theme and thesis are almost indistinguishable, the logic for one flows seamlessly to the other.

c. Prosecution Grab in a Domestic Violence Case

In the very difficult context of domestic violence prosecutions, some prosecutors play the audio recording of the victim's 911 call, if available, for their grab at opening. Imagine the impact as the jurors hear the victim screaming that the defendant is hitting her, trying to kill her, begging for help to arrive. This could be particularly critical if the victim is recanting, as so often happens in domestic violence cases.⁴⁵ A more conventional grab may be as follows:

There are abusers and there are victims. And much of the abuse suffered happens behind closed doors, far from the prying eyes of those who would intervene, who would help. That sad reality has always been with us. Unfortunately, most days, we are all powerless to hold abusers accountable and stand up for victims. But today is different. Today you are going to learn how the defendant abused his wife. Today, you will be in a position to take action. During the course of this trial, we will prove that on October 5, the defendant beat his wife so badly she was hospitalized with severe injuries. And today, you will be in a position to hold him accountable.

While this may not match the drama of a 911 call, it serves the necessary functions of introducing the theme of victims and abusers, a well-worn trope in domestic violence that has persisted through the ages. Though this notion may seem antiquated in some respects, juries have historically relied on this binary construction.⁴⁶ The thesis here is fairly straightforward: the prosecution should succeed in convicting the abuser because the evidence will show he inflicted serious bodily injuries on his spouse.

⁴⁵ See Louise Ellison, *Prosecuting Domestic Violence Without Victim Participation*, 65 MOD. L. REV. 834, 834 (2002) (discussing a study in England and Wales which found that 46% of victims withdrew their support for the prosecution of the case after filing the initial complaint).

⁴⁶ See Toby D. Goldsmith, *Who Are the Victims of Domestic Violence?*, PSYCHCENTRAL, <https://psychcentral.com/lib/who-are-the-victims-of-domestic-violence/> (last updated Oct. 8, 2018) (noting that domestic abuse occurs between a victim and an abuser).

d. Defense Grab in a Domestic Violence Case

Representing an individual charged with domestic abuse can be a daunting challenge because there is typically a significant emotional inclination towards the charging party. Countering that emotional uphill battle can be a severe challenge, but consider the following approach:

A man striking a woman, for any reason, is never right and must always be condemned. But equally egregious to a law-abiding society is someone falsely claiming she was beaten. That too is also wrong and should never be tolerated. The evidence will establish that Frank Robinson is sitting in the defendant's chair for one reason and one reason only. Because his wife was angry at him for losing his job. The evidence will show she made this false claim to get back at him for his perceived inadequacy, as a man, as a husband, and as a provider for his family.

This grab performs the difficult task of both condemning domestic violence and contrasting the present case with that credo. The advocate ties in his stance with the theme that it is also wrong for someone to make a false claim. The advocate's thesis comes near the end where he makes a clear statement that the evidence will show the real reason for Mrs. Robinson's false claim was her anger over her husband's job loss.

C. PERSONALIZE THE PARTIES

An audience is more likely to view conflicting evidence in the light most favorable to the person with whom they best identify.⁴⁷ This holds true in politics, workplace controversies, church disputes, and family matters.⁴⁸ Moreover, the perspectives and biases individuals bring to contested affairs frequently carry over to their ultimate opinion.⁴⁹ That maxim remains true

⁴⁷ See Note, *Confirmation Bias and the Power of Disconfirming Evidence*, FARNAM STREET, <https://fs.blog/2017/05/confirmation-bias/> (last visited Oct. 31, 2018) (noting that people tend to cherry-pick information that confirms their ideas).

⁴⁸ See Bettina J. Casad, *Confirmation Bias*, ENCYCLOPAEDIA BRITANNICA (Aug. 2, 2016), <https://www.britannica.com/science/confirmation-bias> (noting that all people are subject to interpreting information in a way that confirms their beliefs, expectations, and predictions).

⁴⁹ See Eric Rassin et. al., *Let's Find the Evidence: An Analogue Study of Confirmation Bias in Criminal Investigations*, 7 J. INVESTIGATIVE PSYCHOL. & OFFENDER PROFILING 231, 242 (2010) (finding that initial beliefs of a suspect's guilt or innocence impacted the jurors' attention towards subsequent evidence).

for individuals impaneled as jurors.⁵⁰ As discussed earlier, jurors are drawn to one side or another during opening statements and will most likely view the forthcoming evidence through the lens most favorable to “their” side.⁵¹ The evidence then presented supporting their view will reinforce their initial bias, and contrary evidence will be viewed skeptically.⁵² Thus, it is the early personalization of the parties that helps form the jurors’ initial biases.⁵³ Positive impressions of a party will influence the jurors’ belief that an individual or an organization is likeable, admirable, or relatable.⁵⁴ Conversely, negative first impressions will be difficult to overcome and such individuals so branded are not perceived as credible in the eyes of the jurors.

1. *Make a Positive First Impression*

Given the importance of personalization, advocates should expend considerable time and thought in crafting the personalization of their client.⁵⁵ A brief *pro forma* effort will not suffice. The personalization should follow on the heels of the grab but come before moving on to tell the “story,” the chronology of the events that will be the focus of trial.⁵⁶ The personalization should be conducted at the shoulder of the client so as to further identify the party with the lawyer, based on the notion that the goodwill generated by counsel will spill over to the client.⁵⁷ Given the competing narratives set forth during opening statements, the party who better personalizes their client will likely have the upper hand as the trial progresses to witness examinations.

⁵⁰ See Bill Kanasky, Jr., *Juror Confirmation Bias: Powerful, Perilous, Preventable*, 33 TRIAL ADVOC. Q. 35, 35 (2014) (“[J]urors [tend] to search for, interpret, or remember information in a way that ‘confirms’ their preconceptions [or beliefs].”).

⁵¹ Christopher A. Cosper, *Rehabilitation of the Juror Rehabilitation Doctrine*, 37 GA. L. REV. 1471, 1480-83 (2003) (noting that confirmation bias effects jurors as they listen to evidence about a case).

⁵² See David C. Sarnacki, *Winning Divorce Trials*, 81 MICH. B.J. 22, 24 (2002) (explaining that jurors frequently accept facts that support their beliefs and discount facts that do not).

⁵³ See Daniel G. Kagan, *Advocacy in Jury Selection*, in A PRACTICAL GUIDE TO SUPERIOR COURT PRACTICE IN MAINE § 19.2 (1st ed. 2015 & Supp. 2018) (noting that at the outset of the case, the jury forms impressions about the participants in trial).

⁵⁴ See Michael J. McNulty III, *Practical Tips for Effective Voir Dire*, 48 LA. B.J. 110, 110-11 (2000) (explaining that a good first impression can establish rapport with the jury).

⁵⁵ See *id.* (indicating the importance of establishing the credibility and trustworthiness of the client).

⁵⁶ See 5 AM. JUR. *Trials* § 285 (2019) (noting that one of the first things a trial advocate should do is dispel any association of him with unfavorable images).

⁵⁷ See Kagan, *supra* note 53, § 5.

In representing a corporation, company, or organization, personalization becomes even more essential. After all, the positive qualities we associate with persons do not generally extend to non-persons. Of course there are some exceptions, like Doctors Without Borders, the Red Cross, and Habitat for Humanity. But for the most part, companies do not generate positive impressions. In fact, most will probably present an impersonal and unsympathetic image. One approach to representing a corporation is choosing a representative of the corporation (generally middle management) to sit at counsel table as the face of the organization for the duration of the trial.⁵⁸ That individual must be conversant in the facts of the case, personable, and relatable to the jurors.⁵⁹ The representative should be personalized first, making him the embodiment of all that is positive in the corporation, before discussing the corporate entity itself.⁶⁰

Several studies have documented the significance of personalization. Researchers at the Institute of Psychology in the Netherlands analyzed whether participants in their study made different conclusions of a defendant's guilt or innocence based on the initial personalization of the subject.⁶¹ The seventy-nine participants received a thorough case file identifying a young man as a suspect in the beating of another.⁶² Before and after reading the case file, the participants shared whether they believed the suspect was innocent or guilty.⁶³ After the participants reviewed the case file, they could request additional "investigations" to assist in their verdict.⁶⁴ The researchers found that participants who initially believed the suspect was innocent chose to discover additional evidence supporting the suspect's innocence, whereas participants who initially believed the suspect was guilty chose to discover facts supporting the suspect's guilt.⁶⁵ The study determined that the evidence

⁵⁸ See Merrie Jo Pitera, *Selecting Your Corporate Representative*, LITIG. INSIGHTS (May 2, 2013), <http://litigationinsights.com/jury-consulting/selecting-your-corporate-representative/> (noting that jurors expect a representative to exude the values of their companies).

⁵⁹ See PERRIN ET. AL., *supra* note 20, at 125-26.

⁶⁰ See *id.*

⁶¹ See Rassin et. al., *supra* note 49.

⁶² See *id.* at 234. All of the students were law students, sixty-eight were women, and the mean age of the group was twenty-one years of age (ranging from nineteen to twenty-seven). *Id.*

⁶³ See *id.*

⁶⁴ See *id.* Half of the possible investigations the participants could utilize strengthened the evidence against the suspect, whereas the other half were "framed so as to obtain exonerating information, by either reducing the strength of existing incriminating evidence, or by obtaining evidence for an alternative scenario" such that they were directed at reducing the strength of the existing evidence against the suspect. *Id.*

⁶⁵ See *id.* at 238.

each participant sought was determined by their preliminary impression of guilt or innocence, supporting the notion that a juror's initial impression of a party can significantly impact their ultimate decision.⁶⁶

Several other studies suggest that a person's ability to identify with someone impacts his or her belief in the rightness of that individual's opinions.⁶⁷ These studies aimed to see how similarity and identification work in the context of narrative persuasion.⁶⁸ In one experiment, law students read two versions of the same story about a woman whose husband was killed.⁶⁹ One story was from the perspective of the lawyer defending the accused and the other from the perspective of the victim's widow.⁷⁰ In a second study, medical students read a casefile about whether a person suffering from Alzheimer's should be euthanized.⁷¹ One perspective was that of a son who promised his father he would request euthanasia for him if his condition worsened, the other from the perspective of the treating doctor who opposed euthanization.⁷² The results indicated that the law students identified more with the lawyer than the victim's widow in the criminal case, and the medical students identified more with the doctor than the son in the euthanasia case.⁷³ However, the results still indicated that "the impact of the story perspective proved stronger: law readers as well as medical readers identified more strongly with the protagonist [of the story] even if the antagonist was a lawyer or [doctor] . . . the strategic use of language can have

This finding is well in line with research in other decision-making areas, suggesting that people tend to look for information confirming their prior beliefs . . . [and] the context of criminal proceedings is no exception The findings stress the importance of delaying conclusions (about guilt) until all relevant information is obtained. Preliminary conclusions may bias subsequent information search, which is detrimental, especially in case of decisions that affect other people's lives, such as criminal convictions.

Id.

⁶⁶ *See id.*

⁶⁷ *See* Hans Hoeken et. al., *Story Perspective and Character Similarity as Drivers of Identification and Narrative Persuasion*, 42 HUMAN COMM. RES. 292, 308 (2016); *see also* Anneke de Graaf et. al., *Identification as a Mechanism of Narrative Persuasion*, 39 COMM. RES. 802, 817 (2012).

⁶⁸ *See* Hoeken et. al., *supra* note 67, at 295-96; *see also* de Graaf et. al., *supra* note 67, at 805-06.

⁶⁹ *See* Hoeken et. al., *supra* note 67, at 297-98. The first study involved 120 humanities and law students. Almost 70% of the participants were female, and the participants ranged in age from eighteen to twenty-seven years old, with an average of twenty-one years old. *Id.* at 297.

⁷⁰ *Id.* at 297-99.

⁷¹ *Id.* at 303. The second study involved 120 humanities and medical students. *Id.* About 60% of the participants were female, and the participants ranged in age from seventeen to twenty-seven years old. *Id.*

⁷² *Id.*

⁷³ *See id.* at 302-06.

readers identify more strongly with a character even in the presence of an alternative character they perceive as more similar to themselves.”⁷⁴ These studies illuminate one consistent truth: people relate more to others when they can see the world from their point of view.⁷⁵

The empirical research is clear that advocates must personalize their clients and strive to have the jurors identify with them at the earliest possible opportunity. Personalization increases the likelihood that jurors will pay particular attention to facts supporting the party with whom they identify.⁷⁶ Portraying the client as more colorful, more human, and more relatable, will help the jurors “see themselves” in the party, allowing them to relate to the party on a personal level. The following are some illustrations of ways to personalize a client.

2. *Illustrations of Personalization*

Sometimes personalizing a client is simple, as in the case of a dedicated family man who made a careless mistake long ago, or a hardworking single mom with a painful injury—someone who has suffered a grievous wrong with whom the jurors can instantly sympathize. But other times, the client is a corporate giant and it seems impossible that it could have a soul. The goal of personalizing is to remind the jurors that even corporate entities are made up of human beings who work hard to make their organization successful.⁷⁷

a. *Personalization of Plaintiff in a Personal Injury Case*

The following is a personalization of a devoted family man, a fairly straightforward introduction of a relatable individual:

⁷⁴ See *id.* at 306.

⁷⁵ See sources cited *supra* note 67.

[T]he perspective manipulation proved to override the impact of attitude similarity. Participants identified more strongly with the perspectivizing character than with the antagonizing character regardless of the opinion of the characters, and subsequently, participants adapted their attitudes accordingly. This study thus provides evidence for the relation between attitude similarity and identification, while at the same time establishing a causal relation between perspective, identification, and narrative persuasion.

de Graff et. al., *supra* note 67.

⁷⁶ See sources cited *supra* notes 53-54, 61, 67.

⁷⁷ See PERRIN ET. AL., *supra* note 20, at 125-26.

Jerry Utley is, above all, a family man. He is absolutely devoted to his wife Karen and his son Scott. Karen is a stay-at-home mom who is active at her son's school. Scott is a junior in high school, a good student, and second baseman on his high school baseball team. Jerry is a postman, not the most glamorous profession, but an important job that he takes very seriously. His job, as we can imagine, is physically demanding, and frankly, Jerry enjoys the physical challenge of his work, and was proud of his strength.

For seventeen years, Jerry did his rounds every day. That is, until January 19th of last year, when the defendant failed to stop at a red light and hit Jerry in his car. Jerry was gravely injured. Despite surgeries and physical therapy, he will never be able to work in the physically demanding job he did before the accident, or really any job with any physical requirements. It is safe to say that the defendant's actions took, and continue to take, a heavy toll on Jerry Utley and his family.

This is an example of an easier personalization. The plaintiff here is a hardworking civil servant who was grievously injured and whose injury impacts his small family.

b. Personalization of a Corporate Defendant in a Wrongful Termination Case

Next, consider the more difficult task of personalizing a corporate defendant, represented by a department head who is both involved in the case and highly relatable.

Bess Rogers sits here today as a representative of Avco Machinery. Ms. Rogers holds a masters in engineering, she is happily married, and has two beautiful children. At Avco, she oversees product development. You will learn during the course of this trial how she and Avco strive to treat all 120 people she works with like family. She always goes the extra mile to work through problems, always looking for a win-win solution. For her, job satisfaction is a high priority. That's why Ms. Rogers is sitting here today, because she represents the very best of Avco and its commitment to

doing right by its employees. When she gets a chance to speak to you, she will tell you that, unfortunately, not all problems can be fixed. She'll tell you that as a board member of Avco's Human Resources department, she worked with the plaintiff to address his concerns, but for some reason, the plaintiff was uncooperative. He alone prevented them from finding a workable solution.

As this illustration shows, personalizing a corporate defendant requires a representative who represents the best aspects of the company, and who will testify to some relevant evidence at trial.⁷⁸ Giving this representative some personal character shows the jury that even large corporations are comprised of human beings who will be affected by their verdict.

D. TELL A STORY

The story is an account of the events leading up to trial. At its core, an opening statement should set forth a factual overview of what the advocate anticipates the evidence will establish.⁷⁹ Advocates should not limit this story to only a boring recitation of facts. Such a tactic undervalues this phase of the opening statement, which should be a cohesive, compelling, and easily understood story told from the client's perspective.⁸⁰ Delivering the essential information within the framework of a story maximizes juror attention and retention.⁸¹

Advocates generally opt for a straightforward chronological approach.⁸² Most people find it easiest to understand events in the order they occurred.⁸³ However, in some cases it might be necessary to set forth the backstory to give the jurors a better understanding of the events that led up

⁷⁸ See *id.* at 126.

⁷⁹ See LANE, *supra* note 30, § 10:5 (noting that the purpose of an opening statement is to set forth the case's evidence).

⁸⁰ See William Allison, *Tell Your Story Through Opening Statement*, 34 TRIAL 78, 81-83 (1998) (emphasizing that a good opening statement engages in captivating story-telling).

⁸¹ See 5 PHILIP J. PADOVANO, FLORIDA CIVIL PRACTICE § 18:1 (2017-18 ed.) (noting that a good trial lawyer will reveal a skillful and engaging description of the facts to keep the attention of the jury).

⁸² See HEDGES & HEDGES, *supra* note 30 (noting that because most people think chronologically, jurors are more likely to understand an opening statement that flows from beginning to end).

⁸³ See *id.* (explaining the benefits of using chronological order).

to trial.⁸⁴ For instance, describing each key person involved in the story and their interrelationships may be essential to a full understanding before launching into the details of the events leading to trial.⁸⁵ Every trial, of course, is fact specific. The most important rule is to set forth a clear, understandable story.

The following are some suggestions for maximizing the value of the story: keep it interesting, strike the proper balance, and use a list.

1. Make It Interesting

Trials are about people and their problems, conflicts, injuries, and misfortunes. Events leading to trial are acutely important to those involved, they are also generally interesting to jurors. As a result, trial advocates generally have interesting material to work with, and they must take care to not bog down the trial with banalities that distract from the human stories at the heart of the trial.⁸⁶

a. Illustration: A Poor Example of Defense Open in a Civil Trial

Unfortunately, opening statements frequently stagnate when advocates veer from the story. One common mistake is beginning the opening statement by explaining to the jurors the purpose of opening statement. Too often jurors hear some version of the following:

The purpose of opening statement is to give you an overview of the evidence you will hear. Think of an opening statement as the table of contents in a book. First you will learn about the various characters who will play a part. In chapter two you will hear about a dispute that occurred between the plaintiff and the defendant. The next chapter will focus on how the plaintiff was injured when the dispute was not resolved. And in the final chapter you will learn what efforts the defendant made to minimize the harm to the plaintiff.

⁸⁴ See PERRIN ET. AL., *supra* note 20, at 129-30.

⁸⁵ See *id.*

⁸⁶ See BILLIE COLOMBARO ET. AL., LOUISIANA CIVIL TRIAL PROCEDURE § 4:2 (2018) (noting that a jury that is overwhelmed with evidence will quickly lose interest).

As stated earlier, there is only one first impression and such an unfortunate opening gambit wastes it, turning a compelling story of the defendant's misdeeds into mind numbing, worthless tripe. First and foremost, the words and content of the story can impact how the jury perceives the events and the advocate—as bright and present, or muted and boring. Advocates should use active, strong language rather than weak, passive language.⁸⁷

Another common error is to introduce the law in an opening statement.⁸⁸ Even though the rules of opening specifically preclude extensive discussion of the law, most judges will allow some limited discussion to help focus the jurors.⁸⁹ For instance, it is not uncommon for criminal defense attorneys to briefly mention reasonable doubt or for a plaintiff's attorney to offer a cursory explanation of the cause of action. But a detailed discussion of the law will not only draw the ire of the judge, it will also distract jurors from hearing the story at the heart of the trial.⁹⁰

b. Illustration: A Poor Example of a Defense Open in a Criminal Trial

Particularly in criminal trials where the risk to life and liberty are highest, defense attorneys must take extra care to not overburden the jury with the complexities of “beyond a reasonable doubt,” and risk overwhelming the jury.⁹¹ The following should never occur during an opening statement:

The prosecutor in this case has the most demanding burden of proof in our entire justice system. He must prove beyond any reasonable doubt that my client did what he is accused

⁸⁷ See LAURIE L. LEVENSON, CALIFORNIA CRIMINAL PROCEDURE § 23:12 (2018) (emphasizing that the language of opening statements should be simple, strong, and active).

⁸⁸ See RICK FRIEDMAN & BILL CUMMINGS, THE ELEMENTS OF TRIAL 94-97 (2013).

⁸⁹ See Williams, *Effective Opening Statements*, A.B.A., 1, 7 (2003), <https://apps.americanbar.org/labor/lel-aba-annual/papers/2003/mcwilliams.pdf> (noting that law is not typically discussed during opening statements but can be carefully introduced).

⁹⁰ See *id.* (emphasizing that the judge will give the law to the jury).

⁹¹ FRIEDMAN & CUMMINGS, *supra* note 88, at 99 (noting that while most of the case may seem clear to the advocate, “[t]he jurors are starting in complete and total ignorance . . . [the advocate] must educate them about the simplest parts of [the] case without patronizing”).

of. This burden is way beyond a mere preponderance of the evidence that is used in civil cases. The prosecutor's burden here is to eliminate *any* reasonable doubt whatsoever. So if you find yourself thinking "Well, maybe . . ." that is a reasonable doubt.

Such a lengthy explanation is not only completely objectionable, but also uninteresting and distracting from the story. Opening statements are about relating the interesting and informative story at the heart of the case.

2. *Strike the Proper Balance*

Unlike the advocates who have been preparing their case for weeks (if not months or years) and are thoroughly versed in the facts, the jurors have never heard the facts before.⁹² While the advocates are immersed in the case and conversant with every minute detail, the jurors are hearing the story for the first time and if events or persons involved are not clear in that first telling, the jurors may become lost, confused, or frustrated. That confusion or frustration will cost counsel dearly.⁹³ One way to avoid gaps in the story and juror misunderstanding is to deliver the opening statement to a friend or acquaintance who is unfamiliar with the trial and then have that person relate back what the trial is about. If the test subject confuses events or parties or is not compelled to side with the advocate's side of the case, there is still time to address the concerns before the jury reacts similarly.

In order to keep the story focused, advocates must strike the proper balance between clarity and accuracy.⁹⁴ They must relate the essential facts for the jury to understand what occurred but must be wary of overwhelming the jurors with unnecessary information.⁹⁵ By not giving enough facts, the jurors are left with only part of the story and may not comprehend the full scope of the events leading to trial. On the other hand, too much detail will overload the jurors with nonessential facts and cause them to get lost in the

⁹² See *id.*

⁹³ See HEDGES & HEDGES, *supra* note 30, § 5:7 ("[The] opening statement prepares the minds of the jury to follow the evidence and to understand its materiality, force, and effect.").

⁹⁴ See Williams, *supra* note 89, at 1-2 (noting that opening statements should draw on the themes and theory of trial, to lead to a favorable jury decision).

⁹⁵ See William F. Sullivan & Adam M. Reich, *Opening Statements: Tips for Effectiveness in 15 Minutes or Less*, A.B.A (Sept. 18, 2013), <https://apps.americanbar.org/litigation/committees/youngadvocate/articles/fall2013-0913-opening-statements-tips-effectiveness-15-minutes-less.html> (discouraging lawyers from emphasizing every detail of their case).

minutia or worse, cause them to give up trying to make sense of so much information.⁹⁶

The essential must not be overburdened with the nonessential. For instance, not every person involved in the trial needs to be referred to by name. Certainly the key people involved should be referred to by name, but beyond that, characterizations are sufficient and much easier for the jurors to keep in mind.⁹⁷ For instance, instead of “Fran Newcombe,” refer to her simply as “the crossing guard.” The name of the crossing guard is not essential to the story, only that the crossing guard was working the intersection where the accident took place. Likewise, compass directions will confuse most jurors.⁹⁸ Instead of stating that the defendant was driving eastbound on “Erie Avenue” and then turned north onto “Coldbrook Boulevard,” the advocate should describe the defendant as driving on “Erie” and making a left turn onto “Coldbrook.” The latter is much easier to follow. Advocates must strike the proper balance: give the jurors enough that they understand the events, but not overload them with unnecessary detail such that they get lost.

3. Use a List

One essential component of opening statement is presenting a fact specific list of three to five compelling facts which support the advocate’s position.⁹⁹ Such a list will assist jurors in keeping in mind the most significant aspects of the case as those facts are developed at trial.¹⁰⁰ A list is essentially the advocate’s agenda of why she should win. When that agenda is put forth during opening statements and reiterated during closing

⁹⁶ See Susan E. Brune, *The Opening Statement: Taking Control of the Narrative*, A.B.A. (Aug. 7, 2017), https://www.americanbar.org/groups/litigation/publications/litigation_journal/2013-14/summer/the_opening_statement_taking_control_the_narrative/ (discouraging an overly detailed recitation of the evidence in opening statements).

⁹⁷ See 5 AM. JUR. *Trials* § 285 (2018) (emphasizing the importance of humanizing the client and encouraging advocates to refer to their client by name).

⁹⁸ See Guy Deutscher, *Does Your Language Shape How You Think?*, N.Y. TIMES (Aug. 26, 2010), <https://www.nytimes.com/2010/08/29/magazine/29language-t.html> (noting that different cultures express location and direction in different ways, such that some cultures are well versed in compass based directions whereas other cultures utilize egocentric based directions).

⁹⁹ See PERRIN ET. AL., *supra* note 20, at 139-40.

¹⁰⁰ See *id.* (“A list serves as a useful tool for jurors because it enhances their retention of the material presented.”).

arguments, it provides compelling reasons for the jurors to side with the advocate during deliberations.¹⁰¹

Each list point should be written out as it is spoken. It is beyond dispute that people recall visual information better than auditory information.¹⁰² By writing the list and then talking through it, the list points become imbedded in the minds of the jurors.¹⁰³ Researchers have found that “jurors remember 85 percent of what they see as opposed to 15 percent of what they hear.”¹⁰⁴ Conversely, too many list points (more than five) will be overwhelming and difficult for the jurors to retain under such pressured conditions.¹⁰⁵

After each list point is written, the advocate should turn away from the list and discuss that point. Writing the point first helps imbed the point with the jurors, allowing them to read and briefly digest the synthesized statement before the advocate expounds on that point.¹⁰⁶ Advocates should not write the entire list first and then discuss each point.¹⁰⁷ The jurors will lose focus as they consider the complete list and will not attend the discussion of each point. Advocates may use a whiteboard, butcher paper, or PowerPoint to preserve the list which can then be used again during closing argument. Reiterating the points again at closing argument cements the advocate’s agenda just prior to jury deliberation.¹⁰⁸

¹⁰¹ See *id.*

¹⁰² See *id.* (“People are essentially ‘visual learners.’ Jurors will likely forget what they are told, whereas information they are told *and* shown is likely to be remembered.”).

¹⁰³ See Lionel Standing et. al., *Perception & Memory for Pictures: Single-Trial Learning of 2500 Visual Stimuli*, 19 PSYCHONOMIC SCI. 73, 73-74 (1970).

¹⁰⁴ See *id.*

¹⁰⁵ See Angela Kinnell & Simon Dennis, *The List Length Effect in Recognition Memory: An Analysis of Potential Confounds*, 39 MEMORY & COGNITION 348, 349 (2011).

¹⁰⁶ See PERRIN ET. AL., *supra* note 20, at 140.

¹⁰⁷ See *id.*

¹⁰⁸ Sean H.K. Kang, *Spaced Repetition Promotes Efficient and Effective Learning: Policy Implications for Instruction*, 3 POL’Y INSIGHTS FROM BEHAV. & BRAIN SCI. 12, 13 (2016) (“Having the initial study and subsequent review or practice be spaced out over time generally leads to superior learning.”).

a. Illustration: Defense List in a Wrongful Death Case

Using the same mock trial as the second illustration of Section B involving the firefighter who was killed attempting to rescue the fallen rock climber,¹⁰⁹ the defense list may be as follows:

- Completely dark
- Unknown mountainous terrain
- Running - 100 yards ahead of partner
- Slick surface, slick shoes

Note each point is short and fact specific. This list sets forth a memorable, fact specific agenda as to why the defense should prevail because of the unreasonable conduct of the heroic but negligent firefighter.

E. PRICK BOILS

Every advocate in every trial will confront problems such as hurtful evidence, difficult witnesses, admissible prior convictions, and so on.¹¹⁰ Given this inevitability, advocates must deal with these problems as early as practicable and as thoroughly as possible.¹¹¹ Pricking boils serves two essential functions: first, and most obvious, it serves to lessen the negative impact of the problematic evidence.¹¹² By broaching the problem first, advocates can mitigate its negative impact and deprive the opposition of the

¹⁰⁹ See ROTHSCCHILD ET. AL., *supra* note 44.

¹¹⁰ See Robert J. Jossen, *Opening Statements*, in MASTER ADVOCATE'S HANDBOOK 61, 65 (D. Lake Ramsey ed., 1986) ("The other side will dwell on the fundamental problems in your case, so it is better for you to be the first to frame the facts. Problems in evidence that will be adduced and received should be disclosed such as 'criminal records, prior bad acts, inconsistent statements, or damaging admissions.'"); see also THOMAS A. MAUET, *FUNDAMENTALS OF TRIAL TECHNIQUES* 47-48 (3d ed. 1992).

Often a difficult decision in opening statements is whether, and if so how, to volunteer weaknesses. This involves determining your weaknesses and predicting whether your opponent intends to use them at trial. There is obviously no point in volunteering a weakness that would never be raised at trial. Where, however, that weakness is apparent and known to the opponent, you should volunteer it. If you don't, your opponent will, with twice the impact.

Id.

¹¹¹ See Jossen, *supra* note 110 (noting that an effective advocate not only emphasizes the weakness in her adversary's case but also directly confronts the problems in her own).

¹¹² See Williams et. al., *The Effects of Stealing Thunder in Criminal and Civil Trials*, 17 L. & HUM. BEHAV. 597, 597 (1993).

“shock value” of revealing the information first.¹¹³ Second, and perhaps more important, revealing the damaging information first enhances the advocate’s (and client’s) credibility.¹¹⁴ An advocate who is willing to admit damaging information is generally perceived as truthful.¹¹⁵ Conversely, failing to acknowledge the boil at the first possible opportunity will damage the advocate’s credibility as the jurors are left to speculate why she did not bring it up.¹¹⁶

Boil pricking is inextricably related to personalization, a concept which is discussed in more detail above. A client who has suffered an admissible prior offense (as determined during pretrial motions) or who has engaged in damaging conduct must be brought forth and presented to the jury in the best light possible.¹¹⁷ Indeed, dealing with problematic facts is not just a suggestion but a necessity.¹¹⁸ The party who first raises a negative fact has the best opportunity to control and shape how the jurors perceive that evidence.

1. *Inoculate the Jury*

Pricking boils is critical in order to inoculate jurors against hurtful evidence. Inoculation theory is borrowed from the medical sciences,¹¹⁹ a

¹¹³ See *id.*

¹¹⁴ See Ronald J. Waicukauski et. al., *Ethos and the Art of Argument*, 26 LITIG. 31, 31 (1999) (“An advocate who creates the impression that he or she is a person of honesty and integrity will have a considerable advantage over one who is perceived otherwise.”); THOMAS SANNITO & PETER J. MCGOVERN, COURTROOM PSYCHOLOGY FOR TRIAL LAWYERS 168-69 (1985) (“Once attorneys earn credibility, jurors will take advocates at their word and will ignore inconsistencies and rationalize weaknesses in the case.”); see also 1 HERBERT J. STERN, TRYING CASES TO WIN: VOIR DIRE & OPENING ARGUMENT 28 (1991).

¹¹⁵ Michael B. Keating, *Opening Statement*, in MASSACHUSETTS COURTROOM ADVOCACY § 4.6.4 (3d ed. 2017) (noting that by mentioning bad facts an advocate preserves her credibility).

¹¹⁶ See JEFFREY T. FREDERICK, THE PSYCHOLOGY OF THE AMERICAN JURY 157 (1987) (“If a source is perceived to be of dubious credibility, then there is no reason to accept the message.”).

¹¹⁷ See MAUET, *supra* note 110.

¹¹⁸ See *id.*

¹¹⁹ See William J. McGuire, *Inducing Resistance to Persuasion: Some Contemporary Approaches*, in 1 ADVANCES EXPERIMENTAL SOC. PSYCHOL. 201 (Leonard Berkowitz ed., 1964).

notable example of which is the first polio vaccine.¹²⁰ Until Jonas Salk's vaccine in 1955, tens of thousands of Americans every year were paralyzed or killed by the poliovirus, in addition to millions more stricken around the world.¹²¹ When the vaccine was first introduced, many were concerned that subjecting their loved ones to the polio vaccine would actually infect them with the very disease they were trying to avoid.¹²² Of course, their concerns were ultimately unwarranted, and the vaccine was safe for a vast majority who received it.¹²³

Similarly, an advocate fearing damaging evidence is akin to those who initially feared the polio vaccine. Anxiety over the damaging information and the resulting desire to avoid that negative fact is counterintuitive. By raising the negative information first, the advocate is actually inoculating the jury to much of the negative fact's destructive force.¹²⁴ Research supports the notion that people can be protected from attack by opposing arguments through early exposure to weakened forms of the attacking message.¹²⁵ Thus, while the "boil" must be pricked during opening statements, the advocate must take care not to overemphasize the

¹²⁰ See Anda Baicus, *History of Polio Vaccination*, 1 WORLD J. VIROLOGY 108, 108-09 (2012),

<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3782271/pdf/WJV-1-108.pdf>.

¹²¹ See *id.*

¹²² Robert K. Plumb, *Science in Review; Cutter Polio Vaccine Report Highlights Difficulties in Dealing with Viruses*, N.Y. TIMES, Aug. 28, 1955, at E9.

¹²³ CENTER FOR DISEASE CONTROL AND PREVENTION, HISTORICAL VACCINE SAFETY CONCERNS, <https://www.cdc.gov/vaccinesafety/concerns/concerns-history.html> (last visited Nov. 5, 2018) (noting that the Cutter Incident—where the vaccine accidentally contained live poliovirus—was an anomaly and the distribution of safe polio vaccinations quickly resumed).

¹²⁴ See Ayn E. Crowley & Wayne D. Hoyer, *An Integrative Framework for Understanding Two-Sided Persuasion*, 20 J. CONSUMER RES. 561, 562-74 (1994).

¹²⁵ See William J. McGuire, *The Effectiveness of Supportive and Refutational Defenses in Immunization and Restoring Beliefs Against Persuasion*, 24 SOCIOLOGY 184, 193-94 (1961); Don Rodney Vaughan, *Inoculation Theory*, in 1 ENCYCLOPEDIA OF COMM. THEORY 514, 515-16 (Stephen W. Littlejohn & Karen A. Foss eds., 2009).

The communicator with the goal to make attitudes, beliefs, and behaviors resistant to change should first warn the audience of a prevalent counterargument toward the attitude. The warning serves to activate the defense component. When individuals' beliefs are threatened, they immediately begin to generate defenses The next step is to make a weak attack. The communicator must remember that too strong a dose would overwhelm the [listener's] immune system The final step in the inoculation process is to encourage passive defense by generating a defensive response.

harmful information such that it “infects” the jurors.¹²⁶ A delicate touch is required to find this balance.

An intriguing use of inoculation occurred immediately after the September 11, 2001 terrorist attacks.¹²⁷ In the run-up to the “war on terrorism,” the Bush Administration effectively inoculated the public and the media against possible downsides to a war.¹²⁸ The administration’s public discussion of the potential downsides of a war was substantial, citing possible challenges because of the length of the war, exiting the conflict, and revitalizing Afghanistan.¹²⁹ The greatest challenge was perceived to be the duration of the war, which was “addressed 24 times over 15 days in the *New York Times*, with the President discussing the issue 13 times.”¹³⁰ Researchers found that media dialogue concerning the length of the conflict became more positive following the inoculation, concluding that, “the Bush Administration aggressively used classic inoculation techniques in preparing for the war on terrorism and that journalists’ valence on key wartime issues moved in step with the administration’s inoculation attempts.”¹³¹

Similarly, in a 1953 experiment, high school students listened to a radio program where a speaker argued that the Soviet Union would not be able to produce large numbers of atomic bombs for at least five years.¹³² One group of students heard a one-sided version containing only arguments supporting this conclusion.¹³³ The other group heard a version with supporting and opposing arguments.¹³⁴ Although the initial impact of the

¹²⁶ See Williams, *supra* note 89, at 5 (noting that the advocate should take care in introducing negative information). “Jurors commonly do not expect lawyers to say anything negative about their own witnesses, their evidence, or their case. Thus by focusing on harmful information, [a lawyer] may call greater attention to the damaging information than necessary.” *Id.* However, the article also noted that it may be wise to “address the negative information and explain why it is not persuasive, thereby emphasizing its insignificance to the case.” *Id.*

¹²⁷ See Andre Billeaudeau et. al., *The Bush Administration, Inoculation Strategies, and the Selling of a “War,”* GLOBAL MEDIA J. 1, 2-3 (2003), <http://www.globalmediajournal.com/open-access/the-bush-administration-inoculation-strategies-and-the-selling-of-a-war.php?aid=35127.pdf>.

¹²⁸ See *id.* at 2; see also Richard Jackson, *War on Terrorism*, ENCYCLOPAEDIA BRITANNICA (Mar. 24, 2014), <https://www.britannica.com/topic/war-on-terrorism>.

¹²⁹ See Billeaudeau et. al., *supra* note 127, at 3, 6.

¹³⁰ See *id.* at 15-16.

¹³¹ See *id.* at 2.

¹³² See Arthur A. Lumsdaine & Irving L. Janis, *Resistance to “Counterpropaganda” Produced by One-sided and Two-sided “Propaganda” Presentations*, 17 PUB. OPINION Q. 311, 312-13 (1953).

¹³³ See *id.*

¹³⁴ See *id.* at 313.

messages was equal in both groups, those who received both the opposing and supportive messages were more resistant to a later counter-argument that the Soviet Union could produce atomic bombs in only two years.¹³⁵ Consequently, the students who were “inoculated” against the counter-argument earlier were more resistant to later attempts to persuade them.¹³⁶

2. *Enhance Advocate and Party Credibility*

The second and perhaps even greater benefit of boil pricking is that it elevates the advocate’s credibility, and thus, the party’s credibility.¹³⁷ Credible sources have the advantage of being seen as more trustworthy and expert.¹³⁸ In turn, advocates perceived as trustworthy are more likely to persuade their audience to align with their perspective of events.¹³⁹ As one seasoned trial advocate wrote:

[T]he personal rectitude of the attorney in the courtroom, as perceived by the jurors, is the most important weapon of a trial lawyer. It is bigger than the facts and bigger than the law . . . the jurors will usually vote for the case of the lawyer they believe in.¹⁴⁰

A 1978 study focused on the “expertise” aspect of credibility.¹⁴¹ Fifty-six students in an undergraduate management class were given a brief written message supporting proposed consumer protection legislation.¹⁴² The first group of students was told the message was from a “Harvard-trained lawyer with extensive experience in the area of consumer issues and a recognized expert whose advice was widely sought,” while the second group was told it was from “an individual with no special expertise, but one who was interested in consumer protection because of a job opportunity as a

¹³⁵ See *id.* at 317-18.

¹³⁶ See *id.*

¹³⁷ See IRVIN V. CANTOR ET. AL., HANDLING AN AUTOMOBILE NEGLIGENCE CASE IN VIRGINIA § 4:14 (2017) (noting that acknowledging the weaknesses in one’s own case can increase credibility).

¹³⁸ See Brian Sternthal et. al., *The Persuasive Effect of Source Credibility: Tests of Cognitive Response*, 4 J. CONSUMER RES. 252, 252 (1978).

¹³⁹ See Elliot McGinnies & Charles D. Ward, *Better Liked than Right: Trustworthiness and Expertise as Factors in Credibility*, 6 PERSONALITY & SOC. PSYCHOL. BULL. 467 (1980).

¹⁴⁰ See STERN, *supra* note 114.

¹⁴¹ See Sternthal et. al., *supra* note 138, at 254.

¹⁴² See *id.*

consumer lobbyist.”¹⁴³ After reading the messages, the students rated the highly credible “Harvard-trained” messenger as “significantly more trustworthy and expert than . . . the moderately credible person.”¹⁴⁴

In studies specifically testing this tactic in mock criminal and civil trials, researchers found that revealing self-damaging information first not only increases the advocate’s and party’s credibility, but also has a positive impact on the jury’s verdict.¹⁴⁵ Researchers conducted mock criminal and civil trials with students in which they read or listened to one of several versions of a case, in some versions of which the party revealed the damaging information themselves.¹⁴⁶ The participants then assessed the credibility of the parties, the advocates, and their verdict for the mock case.¹⁴⁷ In both the civil and criminal mock trials, researchers found that revealing the damaging information first, “significantly affected ratings of witness credibility and verdicts such that people were perceived to be more credible when they revealed negative information about themselves, and this in turn led to more favorable judgments.”¹⁴⁸ Without question, the empirical research illustrates that boil pricking is effective in enhancing the advocate’s and the party’s credibility, and may well have a significant impact on the verdict.

¹⁴³ See *id.*

¹⁴⁴ See *id.* at 255.

¹⁴⁵ See, e.g., Williams et. al., *supra* note 112, at 602-03; Howard et. al., *How Processing Resources Shape the Influence of Stealing Thunder on Mock-Juror Verdicts*, 13 PSYCHIATRY PSYCHOL. & L. 60, 65 (2006). It is important to note that in both of these studies, the damaging information was not relayed to the jury during opening, but by a witness on the stand during direct or cross examination. Further, the authors in *The Effects of Stealing Thunder in Criminal and Civil Trials* suggest that there may be slight distinctions between inoculation theory and stealing thunder, in that inoculation theory is based on introducing a weakened initial attack, whereas stealing thunder is revealing all of the damaging information at once. Williams et. al., *supra* note 112 at 602-03. Even so, the findings on stealing thunder are informative for utilizing the same tactic in an opening statement.

¹⁴⁶ See Williams et. al., *supra* note 112, at 601, 604. The casefiles varied by including no damaging information (the control condition), having the affected party introduce the damaging information themselves, or having their opponent elicit the damaging information on cross-examination. *Id.*

¹⁴⁷ See *id.*

¹⁴⁸ See *id.* at 606-07.

3. *Illustrations of Pricking Boils*

a. Defense Inoculation of a Prior Conviction in a Criminal Case

Were a trial judge at a pretrial hearing to rule that the defendant's prior burglary conviction was admissible, defense counsel, in an attempt to mitigate the negative impact, should seek to introduce that evidence in the best possible light at the earliest possible opportunity.¹⁴⁹ A portion of the defense's opening statement might proceed as follows:

Doug Riddle is going to take the witness stand to tell you his side of the story. He's doing this even though he knows he has a right not to testify. But he wants to tell you that he is not guilty of this crime. He is also going to tell you about a mistake he made seven years ago. Now this trial has nothing to do with what happened seven years ago, but in the prosecutor's mind, that doesn't matter. The prosecutor will try to use Doug's old conviction to convince you that he's a bad guy, that he's not to be trusted. But that's just not true, and you will surely hear that for yourself when Doug takes the stand and owns up to his past. He is going to tell you he was running with some rebellious guys back then, that he got caught up breaking into a warehouse, and that he took some golf clubs. He is not proud of it, he deeply regrets it, he was young and foolish. Doug admitted his guilt, paid the consequences, and is now a better person. He hopes you won't judge him solely on what happened long ago, but only on the facts of this case before you.

Take note that defense counsel is readily admitting the defendant's prior offense, not trying to hide the ball. But more than that, counsel goes

¹⁴⁹ Take note, however, that there are strategic considerations for defense counsel in deciding whether to introduce prior conviction evidence in a criminal trial. If defense counsel believes the prior conviction was improperly admitted for impeachment, it may be unwise for the defense to volunteer that evidence during trial, causing it to be deemed waived on appeal. See *Ohler v. United States*, 529 U.S. 753, 755-56 (2000); Misty D. Garrett, Case Note, *Ohler v. United States: Defendants Waive Appellate Review by Reducing the Sting of Prior Conviction Impeachment Evidence*, 52 MERCER L. REV. 789, 792 (2000) ("The Court . . . [held] a defendant who introduces evidence of a prior conviction during direct examination in an attempt to reduce the sting of impeachment evidence waives appellate review of the alleged erroneous admission of the evidence.").

on to emphasize how long ago the conviction was and the events behind the conviction, and injects a subtle plea for the jury to consider only the evidence of the present case.

b. Plaintiff Inoculation in a Civil Case

In the following illustration, plaintiff counsel will have just finished his grab, approached his client, and rested a hand on his client's shoulder.

Gregory Hines is a young man who was grievously injured when his motorcycle was struck by defendant's Jeep. But before we get into the extent of Greg's injuries, I want to tell you a little bit about Greg Hines the person. He is 19 years old, a student at Camarillo Community College. He is the only son of Emma and Ted Hines, who are sitting right here in the front row to support him.

Against the advice of his parents, Greg was commuting to school on his motorcycle. As you can see in this photograph, Greg's motorcycle wasn't one of those huge growling motorbikes, but a smaller vehicle meant for getting around. Greg will tell you that even though he operates his vehicle safely, he received a traffic citation from the highway patrol two years ago. He's going to come up here and tell you about that ticket. He got it when he was seventeen. He was speeding, going fifteen miles per hour over the speed limit, and changed lanes without signaling. But he owned up to the ticket and went to traffic school, paying it off with three weeks of his earnings from his part time job, a precious sum to a seventeen year old. He'll tell you that he hasn't sped since and uses his turn signal religiously.

As the illustrations reflect, pricking the boil requires a balanced approach. While the boil must be owned up to and then reasonably mitigated, counsel must not attempt to completely whitewash the negative such that she loses credibility. On the other hand, the advocate must not dig too deep into the negative information such that the jurors are left with only that.¹⁵⁰ The studies detailed above show there are few substitutes for pricking the boil to maximize advocate and party credibility. There is no

¹⁵⁰ See Vaughan, *supra* note 125.

time better to do so than during opening statements to ensure that all the evidence and arguments that follow are seen by the jury as coming from a credible source.

F. END STRONG

The focus on the critical nature of primacy in opening statements is warranted, because during the grab and personalization phases, first impressions are quickly formed such that the majority of jurors reach a tentative verdict by the end of opening statement.¹⁵¹ Primacy in the context of opening statement cannot be overvalued.

However, there is also a case to be made for recency, such that the last thought or word prior to concluding any speech should be challenging, memorable, and perhaps even inspirational.¹⁵² In the context of an opening statement, the conclusion should relate back to the central theme, compel the jurors to view the advocate's position favorably, and invite the jurors to be proponents for the advocate's position.¹⁵³ The conclusion must be a firm statement of precisely what the advocate expects the juror to do.¹⁵⁴

1. *Illustration: Plaintiff Conclusion in a Personal Injury Case*

An example of how an advocate can "charge" the jury at the end of opening statement is as follows:

Keep in mind that people are more important than profits. Huge companies such as Ford Motor Company must not be allowed to put its incredible profits above the very lives of the people who buy their cars. Mr. Plavin lost his wife, his lifelong partner, and he will never walk again. Ford knew the danger, ignored the danger, and the Plavins paid the price. At the conclusion of this trial, I am going to stand before you and ask you to hold Ford fully accountable for the devastation it caused the Plavins. Thank you.

¹⁵¹ See *Perdue*, *supra* note 13; *Danner & Varn*, *supra* note 14; *ROBERTS*, *supra* note 15.

¹⁵² See *PERRIN ET. AL.*, *supra* note 20, at 142-43.

¹⁵³ See *id.*

¹⁵⁴ See *GEORGE E. GOLOMB ET. AL.*, 1 *FEDERAL TRIAL GUIDE* § 11.200 (1997) (noting that an opening statement can conclude by reminding the jurors of their role).

In this example, the advocate sums up the key facts the jury will hear during the trial, centers the jury on the most important and emotional aspect of the case, and then charges the jury with their task, subtly recruiting the jurors to the plaintiff's side. As the illustration shows, the charge must be firm but not demanding. A more fervent demand of the jurors may well generate pushback.¹⁵⁵

G. FOLLOW ADVOCACY PRINCIPLES

1. *Anticipate Opponent's Claims and Respond Appropriately*

a. Plaintiff/Prosecution Must Foresee and Preempt Defense Claims

Since counsel for the plaintiff or prosecution delivers her opening statement before counsel for the defense, she must anticipate the defense's opening and preempt anticipated defense claims.¹⁵⁶ Effectively preempting the defense's claims places the defense in the unenviable position of attempting to turn the unfavorable impressions some jurors may already have of its case generated by the plaintiff's or prosecution's opening.¹⁵⁷

In this era of open discovery where virtually no stone is left unturned, both sides are essentially aware of the other's case.¹⁵⁸ Consequently, the advocate going first should take full advantage of characterizing the anticipated defense claims.¹⁵⁹ For instance in an auto accident case alleging the defendant ran a traffic light, the defense claim may be that the plaintiff had a habit of "timing" traffic lights which caused him to prematurely enter the intersection. The plaintiff can point out during

¹⁵⁵ See Rex A. Wright et. al., *Persuasion, Reactance, and Judgments of Interpersonal Appeal*, 22 EURO. J. SOC. PSYCHOL. 85, 86 (1992) ("[A]n opinion statement which is clear but constructed in such a way so to minimally threaten another's freedom to think, feel, and act in the interpersonal sphere will result in [an] agreeable reaction [i]n contrast, a statement which strongly challenges freedom of interpersonal judgment is likely to produce subjective and behavioural resistance.").

¹⁵⁶ See ROBERT E. LARSEN, NAVIGATING THE FEDERAL TRIAL § 6:16 (2018 ed.) (noting that the prosecution should anticipate factual disputes throughout the trial).

¹⁵⁷ See PERRIN ET. AL., *supra* note 20, at 140-42.

¹⁵⁸ See *How Courts Work*, A.B.A., https://www.americanbar.org/groups/public_education/resources/law_related_education_network/how_courts_work/openingstatements/ (last visited Nov. 1, 2018) (discovery enables parties to know of evidence before the trial starts).

¹⁵⁹ See PERRIN ET. AL., *supra* note 20, at 140.

opening statement that the evidence will not support the defense's claim, that it is simply unsupported, and that the defense is attempting to deflect blame and refusing to accept responsibility for his own unreasonable conduct.

b. Defense Counsel Must Respond to and Deflect Plaintiff's Assertions

Following the plaintiff's opening statement can certainly have its drawbacks, especially if opposing counsel generated positive first impressions of her client and her case, effectively inoculating the jurors against the upcoming defense opening. However, one benefit of going second is that defense counsel knows the opposition's exact factual theory and theme. Consequently, defense counsel need not speculate about the plaintiff's claims and can effectively launch a broadside attack against each specific claim. Furthermore, the defense has the last word before the trial turns to the plaintiff's case-in-chief, allowing defense counsel to plant his claims in the jurors' minds just prior to the introduction of the plaintiff's or prosecution's evidence.¹⁶⁰

c. Illustration: Defense Response to Plaintiff's Assertions

One effective technique for defense counsel is to begin his opening statement with a staccato refutation of each claim made by the plaintiff. Once again returning to the case involving the firefighter who died attempting the rescue of a fallen amateur rock climber,¹⁶¹ the defense opening might proceed as follows:

This isn't about a rock climber's lack of training; it's about a firefighter who rushed over slippery terrain in the dark.

This isn't about a defendant who didn't have the proper equipment; it's about a heroic rescuer who disregarded his basic training.

And this isn't about a climber who attempted a rock climb beyond his abilities; it's about a firefighter who, in a rush, failed to use the teamwork essential to his dangerous work.

¹⁶⁰ See *id.* at 142.

¹⁶¹ See ROTHSCHILD ET. AL., *supra* note 44.

Here, defense counsel begins each sequence by refuting the plaintiff's claims and then countering each with his own version of the facts. Since the jury has just heard plaintiff's account of events, it is clear that by directly addressing, refuting, and re-characterizing each claim the defense is not attempting to hide the ball, but rather is confronting each assertion directly and confidently.

2. Use Horizontal Dialogue

The most effective mode of communicating to a small audience like a jury is to talk *with* them (horizontal dialogue) rather than *at* them (vertical dialogue).¹⁶² Horizontal dialogue should resemble a discussion with an acquaintance about a serious matter, an exchange between equals.¹⁶³ Indeed, there should be a "conversational feel" to opening statement.¹⁶⁴ Conversely, vertical dialogue is analogous to a lecture where the "all knowing" lawyer talks down to her jurors.¹⁶⁵ Horizontal dialogue requires an advocate to focus on each individual juror, finish a thought with that juror, and then move on to the next juror to make a new point.¹⁶⁶ Such a one-on-one approach helps build a bond with each juror.¹⁶⁷ Having twelve one-on-one dialogues is more effective than the "speech-scan" style practiced by too many advocates.¹⁶⁸

¹⁶² See Jeff Palmer, *A Return to Advocacy: The Art of Lawyering*, 26 AM. J. CRIM. L. 205, 206 (1998) (explaining that horizontal dialogue allows the lawyer to speak to the jurors as equals); see also MICHAEL S. LIEF ET. AL., LADIES AND GENTLEMEN OF THE JURY: GREATEST CLOSING ARGUMENTS IN MODERN LAW 124 (1998). In *Estate of Silkwood v. Kerr-McGee* (discussed below), Gerry Spence's closing argument is especially notable for his use of horizontal dialogue, "[h]e never talks at his jurors; he chats with them. His engaging 'country lawyer' style builds credibility with his jurors, as he avoids the dreaded 'attorney-speak' of legal jargon and convoluted sentences that are indecipherable to the nonlawyer." *Id.*

¹⁶³ See COLOMBARO ET. AL., *supra* note 86, § 12:56.

¹⁶⁴ See *id.*, § 4:44 (noting that advocates should use a conversational tone and maintain eye contact with the jurors).

¹⁶⁵ See CARROLL & FLANAGAN, *supra* note 4, § 11:24 (noting that an opening statement is about telling a compelling story and not about delivering a legal lecture).

¹⁶⁶ See H. Mitchell Caldwell & Janelle L. Davis, *Timeless Advocacy Lessons from the Masters*, 35 AM. J. TRIAL ADVOC. 19, 43-46 (2011) (noting that mastering horizontal dialogue will facilitate effective communication with every juror).

¹⁶⁷ See *id.*

¹⁶⁸ See Mike Landrum, *Speaking Eye to Eye*, TOASTMASTERS INT'L, <https://www.toastmasters.org/Magazine/Articles/Speaking-Eye-to-Eye> (noting that intentional eye contact is valued by an audience, like a jury, especially in light of

Moreover, such a dialogue is best facilitated by removing barriers between the advocate and the jurors.¹⁶⁹ Podiums, lecterns, legal pads, and laptops interfere with this dialogue by interposing an object between the speaker and her audience, creating a physical barrier. Perhaps more importantly, such objects also divert the speaker's attention to her notes and away from the jurors lending the advocate a less casual manner than horizontal dialogue requires.

Horizontal dialogue mandates the advocate use basic vocabulary.¹⁷⁰ A more sophisticated vocabulary may create an intellectual gap with some jurors; at best, confusing them as to the advocate's meaning; at worst causing those jurors to feel slighted and resentful.¹⁷¹ Words with more than three syllables should be scrutinized and preferably substituted for a more commonly used word. For instance, say "bruise" rather than "contusion," "cut" instead of "laceration," "after" rather than "subsequent."

3. Develop Sound Bites

An effective sound bite is a powerful tool. Who will ever forget Johnny Cochran telling the jurors at O.J. Simpson's trial, "If it doesn't fit, you must acquit"?¹⁷² Corny, but memorable. Though Cochran did not use this sound bite during his opening statement (because the regrettable glove demonstration happened during trial), it is recognized as one of the most compelling sound bites in legal history.¹⁷³ A sound bite helps encapsulate a key aspect of trial, making it easily understood and memorable.¹⁷⁴

the fact that "[t]oo many speakers believe that a constant scan of the audience with their eyes, back and forth like a lawn sprinkler, will do the job").

¹⁶⁹ See PERRIN ET. AL., *supra* note 20, at 149-50.

¹⁷⁰ See COLOMBARO ET. AL., *supra* note 86, § 12:56.

¹⁷¹ See Brett Godfrey, *Make Sense of Medical Jargon*, 43 TRIAL 64, 64 (2007) (noting that when jurors hear words they don't understand their minds will likely wander).

¹⁷² See Jennifer S. Lubinski, *Writer's Workshop for Lawyers Improve Your Trial Skills Using Literacy Techniques*, 53 NO. 9 DRI FOR DEF. 42 (2011) (explaining that rhymes, like Cochran's bit in O.J.'s trial, are easier to remember).

¹⁷³ See Richard D. Williamson, *Closing Thoughts: Quotations from the Closing Arguments of Famous Cases*, NEV. LAW. 50, 50 (June 2014), https://www.nvbar.org/wp-content/uploads/NevLayer_June_2014_BackStory.pdf.

¹⁷⁴ See DENT GITCHEL & MOLLY TOWNES O'BRIEN, TRIAL ADVOCACY BASICS 81 (2006) (noting that a catchy phrase or a hook can grab listeners' attention and implant itself in their brains); see also Imwinkelried, *supra* note 6, at 64 ("[T]he attorney should reduce the strongest argument on the key element to a short, memorable expression. The expression is a shorthand label for the argument.").

- a. Illustration: Spence's Memorable Sound Bite from *The Estate of Karen Silkwood v. Kerr-McGee*

Gerry Spence, in his attack on the Kerr-McGee Corporation on behalf of Karen Silkwood's family, created a memorable sound bite to explain the difficult concept of strict liability.¹⁷⁵ Unfortunately, Spence's opening statement in *Silkwood* has not been preserved. And though this article is about opening statements, it is helpful to read how Spence simplified the complicated concept of strict liability during closing argument.¹⁷⁶ In the following excerpt from his masterful closing argument, Spence refers to his discussion of strict liability in opening statement:

Well, we talked about "strict liability" at the outset, and you'll hear the court tell you about "strict liability," and it simply means: "If the lion gets away, Kerr-McGee has to pay." It's that simple—that's the law. You remember what I told you in the opening statement about strict liability? It comes out of the Old English common law. Some guy brought an old lion on his ground, and he put it in a cage—and lions are dangerous . . . through no fault of his own, the lion got away. Nobody knew how—like in this case, "nobody knew how." And, the lion went out and he ate up some people—and they sued the man. And they said, you know: "Pay. It was your lion, and he got away." And, the man says: "But I did everything in my power—I had a good cage—had a good lock on the door . . . and it isn't my fault that he got away." Why should you punish him? They said: "We have to punish you . . ." You have to pay because it was your lion - unless the person who was hurt let the lion out himself. That's the only defense in this case: unless in this case Karen Silkwood was the one who intentionally took the plutonium out, and "let the lion out," that is the only defense¹⁷⁷

In a few sentences, Spence breathed life into a dry legal concept. In explaining strict liability, Spence boiled the whole concept down to one easy

¹⁷⁵ See William K. Stevens, *Silkwood Radiation Case Is Ready for Jurors Today*, N.Y. TIMES (May 15, 1979), <https://www.nytimes.com/1979/05/15/archives/silkwood-radiation-case-is-ready-for-jurors-today-trial-in-eighth.html>.

¹⁷⁶ See LIEF ET. AL., *supra* note 162, at 127-57.

¹⁷⁷ See *id.*

to remember phrase: “If the lion gets away, Kerr-McGee has to pay.”¹⁷⁸ Throughout the balance of the close, Spence came back to that phrase, and by simply uttering it, his explanation of strict liability is immediately recalled. A sound bite that captures the essence of the case is an extremely persuasive tool. Not unintentionally, Spence’s sound bite also beautifully encapsulated his thesis of why his client should prevail. If one can be developed as early as opening statement, so much the better.

4. *Don’t Make Promises You Can’t Keep*

Be careful what you promise. Counsel should never promise what they may not be able to deliver.¹⁷⁹ If the admissibility of certain evidence is subject to a possible sustained objection, or a witness’s presence is in doubt, an advocate’s promise to produce that evidence or that witness can lead to a devastating attack by opposing counsel during closing arguments.

a. Illustration: Defense Attack on Prosecution’s False Promise During Closing Argument

Folks, you all were listening to counsel’s opening statement and you will recall that she said, “you are going to hear from Ms. McGuire that she saw Frank near the mall the morning of the shooting.” Did we hear any such testimony? Did we hear anything even close to that testimony? Yet opposing counsel assured us we would. What do we make of such a bold promise that was utterly broken. What does that tell us about their case? About the integrity of their case?

It behooves an advocate to take care in stating what witnesses will testify if there is doubt as to whether they will be present, and what evidence will be introduced if there is concern regarding admissibility. At closing, these unfulfilled promises will only serve to injure counsel’s credibility immediately prior to jury deliberations.

¹⁷⁸ See *id.*

¹⁷⁹ See *GIANNA & MARCY*, *supra* note 12, at § 17:2 (advising that advocates should not make promises they cannot keep and noting that if advocates make a promise, they should prove what they say they will prove and deliver what they say they will deliver); see also *FRIEDMAN & CUMMINGS*, *supra* note 88, at 101 (noting that opposing counsel is “just waiting for you to overstate your case or to say something he can prove is inaccurate or incorrect . . . [h]e knows that if he can hurt your credibility, he can hurt your case”).

5. *Use Appropriate Technology*

As discussed earlier, people recall what they see and hear much better than what they only hear.¹⁸⁰ We are all accustomed to receiving much of our information from what we see, from television, cell phones, computer screens, and so on. When we see something it becomes imprinted in our minds, more easily stored and recalled than information we only hear.¹⁸¹ Recognizing this reality, it is good practice to supplement opening statements with visuals.¹⁸² Visuals can range from sophisticated video recreations to the simpler PowerPoint, photo blowup, diagram, or handwritten list.¹⁸³ A list of key facts supporting the advocates case is one “low tech” but effective example discussed above, whether handwritten or integrated into a PowerPoint. Beyond the benefits of increased memory storage and recall, visual stimulation helps retain juror interest and focuses their attention where and when the advocate desires.¹⁸⁴

One cautionary note: occasionally, advocates become too reliant on technology at the expense of their advocacy. Too many PowerPoint slides or photograph blowups could become distracting, and ultimately hinder juror attention and retention. Strike a balance to enhance your opening statement.

6. *Don't Argue*

The purpose of opening statement is to relate a factual overview of what the advocate expects the evidence to establish.¹⁸⁵ Opening statement is *not* the time to argue the case, but of course, advocates *should* present their case in the light most favorable to their position. The primary limit on what advocates can say during opening statement is the prohibition on argument, which precludes advocates from drawing conclusions, making inferences, or

¹⁸⁰ See Standing et. al., *supra* note 103, at 73 (finding that humans have a vast memory for remembering photographic stimuli, though the cognitive mechanisms by which this is accomplished are not fully understood).

¹⁸¹ See Jon Hotchkiss, *Are You More Likely to Remember Stuff You See or Stuff You Hear?*, HUFFPOST, (March 6, 2014, 5:36 PM), https://www.huffingtonpost.com/jon-hotchkiss/memory-test-hearing-vs-seeing_b_4912777.html (noting that visual images are easier to remember, not only because they are encoded differently than auditory material, but because people tend to associate them with things that they are already familiar with).

¹⁸² See PERRIN ET. AL., *supra* note 20, at 27-28.

¹⁸³ See *id.*

¹⁸⁴ See *id.*

¹⁸⁵ See *How Courts Work*, *supra* note 158 (noting that the purpose of the opening statement is to introduce the jurors to what they will be hearing).

going beyond the evidence to be introduced at trial.¹⁸⁶ One rule of thumb is the advocate must have a good faith belief that a witness will be able to competently testify to the fact.¹⁸⁷ If so, the statement is generally not argumentative. Lawyers frequently slip over the line during opening statements, attempting to fend off a sustainable argument objection by prefacing the argumentative phrase with “the evidence will show.”¹⁸⁸ Such a play, of course, cannot render an argumentative statement less argumentative.¹⁸⁹ Nonetheless, many advocates attempt to camouflage their objectionable statements using this gambit.

Despite the prohibition against it, arguing during opening statements occurs frequently and yet many judges are reluctant to sustain an argumentative objection.¹⁹⁰ If, in the judge’s view, the statement is not “overly” argumentative she may let it pass. Catching a sustained argumentative statement can have a debilitating impact on the effectiveness of an opening statement.¹⁹¹ It sends a message to the jury that the advocate is not following the rules and is attempting something underhanded. Advocates must take care to avoid anything too argumentative during opening that may lead to a sustained objection, cutting off the flow of dialogue, and damaging juror opinion of the advocate and her case.

H. CONCLUSION

While it may seem difficult to juggle all of the strictures laid out above, striving to master these fundamental opening statement strategies will yield more effective opening statements. The opening statement is the first real time the jurors will get to hear what the trial is all about, the first time

¹⁸⁶ See Sullivan & Reich, *supra* note 95 (noting that advocates should not make an argument during the opening statement); FRIEDMAN & CUMMINGS, *supra* note 88.

¹⁸⁷ See Wes Porter, *Motions in Limine*, GOLDEN GATE UNIV. SCH. OF LAW 8, 9 (2012), https://digitalcommons.law.ggu.edu/trial_advocacy_evidence/5/ (scroll to bottom then follow “motions_in_limine.pdf” hyperlink under “Additional Files”) (noting that when evidence is introduced the advocate should have a good faith belief that it will be part of trial).

¹⁸⁸ See PERRIN ET. AL., *supra* note 20, at 154.

¹⁸⁹ See *id.* at 158.

¹⁹⁰ See Craig Lee Montz, *Trial Objections from Beginning to End: The Handbook for Civil and Criminal Trials*, 29 PEPP. L. REV. 243, 254-55 (2002) (noting that a sustained objection can have a severely prejudicial impact).

¹⁹¹ See *id.* at 272-73 (“An objection that an opening statement is argumentative may be the most frequent objection at the trial court level, but it rarely receives appellate court scrutiny.”).

they will be provided some context for the evidence they will hear and see, and the first time they will form opinions of everyone involved. No public speaker, no advocate, gets a second chance to make a first impression. If an opening statement is the window into a case, the advocate must take care to ensure the glass is clear, the frame is intact, and the jury is seeing the advocate's view of the case.