

## **Persuasion in the Modern Courtroom: How to Sell Your Case to a Jury**

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*For the Defense*

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Experienced litigators know that, once a case goes to trial, truth alone does not always prevail. Trials are as much about image and perception as they are about facts. It is not the facts alone, but how they are delivered and presented to the jurors that determine the outcome. Litigators must educate, motivate and persuade to prevail. They must attempt to control jurors' reactions from the moment they walk into the courtroom for jury selection until the end of deliberations.

No matter how experienced, trial lawyers can benefit from understanding the dynamics of persuasion. At its basic level, persuasion is inducing or coaxing others to a decision or course of action by an appeal to their reason and feelings. Persuasion isn't the exclusive province of lawyers, of course. Marketers and advertisers use the principles of persuasion to sell everything from perfume to political candidates. Commercials and advertisements are masterful in appealing to needs and feelings as much as to reason. The same elements of persuasion that marketers so successfully use to sell products should be employed in the trial setting.

### Engaging the Jury with a Story

First of all, engage the jurors. When jurors become disengaged, whether out of boredom or lack of understanding, they lose interest in the case and do not become educated or motivated in the way the attorney had intended. Notice that all advertisements and commercials hook the audience with an enticing story, interesting characters and clever graphics, music, and jingles. Translated into trials, the key is that the audience is being engaged, is being "hooked," while the message is being delivered. Trial lawyers do this by fitting their facts into a compelling story line and using universal themes with which jurors can relate and identify.

The first step in telling a good story is deceptively simple: start at the beginning. (This is sometimes referred to as the Adam and Eve Rule, for obvious reasons.) Unfortunately, many lawyers make the mistake of beginning their opening statements in what jurors consider to be the middle of the story, which to them is an artificial starting point, rather than the natural starting point. Jurors need a global and historical perspective in order to relate to the logic, themes, and characters of the story.

For example, an attorney might begin at the point when the parties to a contract first begin disputing with each other over a one line provision, whereas a juror would better understand and identify with the case if the lawyer provided a broader, deeper perspective. The jury wants to know how the parties first met, the events that took place when the contractual relationship was formed, the hopes and expectations of the client, the relationship between the parties, the operation and standards of the industry involved, and even the general business climate at the time the contract was signed. By doing this, the jurors understand the history and context of the story the attorney is telling.

### A Clear Theme

A good story alone does not win a case. To be persuasive, the story must contain clear themes and foster jury identification with the client and the issues. Every case should contain themes that establish the moral force and justness of your client's position. Themes are often rooted in people's understanding of fundamental decency. This coincides with the jurors' desire to right a wrong, to deliver justice. Examples of common themes at trial are violations of trust, not playing by the rules, not taking responsibility, exaggerating injuries to get money, going after the deep pocket, and pursuing profits at the expense of health or safety.

A theme should be able to be delivered to the jury in no more than three sentences. If it takes longer, the persuasive point is being over-intellectualized or over-explained and should be made more concise. Attorneys often make the mistake of giving the jurors too much unnecessary information, which clouds or interferes with the essential message being delivered.

The best way to arrive at a simple, clear theme is to pretend you are telling a ten-year-old child about your case. To explain the dispute to a child, one needs to reduce it to its barest elements. This exercise helps cut through all the verbiage and get to the core of the matter. For example, when talking to a child you might say, "This is a case about a landlord who did not want to fix up an apartment so that people could live in it. He did not want to fix the stove or put a new lock on the door. He just wanted to collect the rent." Or, in a contract dispute, you might tell the child, "This is a situation where two people agreed to do something, but one of them didn't do it. The second person lost a lot of money because he put his trust in what the first person promised to do but didn't deliver." This exercise often provides, in raw form, not only the case theme, but also the first few sentences of an effective opening statement.

#### Metaphors and Analogies

Metaphors and analogies are also important elements of persuasion. A metaphor is a device or idea that organizes complex issues into something easily understood and visualized by jurors. For example, in an intellectual property dispute between two well-known corporations, the prevailing party used a blue box as a metaphor for a microprocessor. The blue box sat on counsel's table throughout the trial and was frequently referred to as the microprocessor containing the only technology the losing party was entitled to use under the agreement in question. When the jurors were interviewed after the trial, it was clear the metaphor had been effective. The jurors had no idea what a microprocessor really was, but they all referred to it as the blue box.

Analogies are important because they translate an abstract concept into an everyday occurrence to foster juror understanding and identification. Analogies should always be tested on lay people before being used at trial. Very often at focus groups, mock jurors provide better analogies than do the lawyers. In a complex insurance coverage case, for example, an analogy to everyday auto insurance helped one mock juror convince other jurors that the insured corporation was only entitled to the specific coverage it had purchased. As the mock juror put it, "If you only buy collision insurance, you can't recover when a limb falls off a tree and damages your car."

#### Demonstrative Aids

Graphics, such as charts, maps, photographs, images projected on a screen, videotapes, and other demonstrative aids, are another important element of persuasion and should be used in opening statement, with witnesses, and again in closing argument. Graphics engage, educate, reinforce the spoken message and aid in retention. They also provide a framework for conceptualization. Concepts should be shown graphically since most people are visual. Be sure to provide the concepts that define the case, rather than allow the other side to do so. Otherwise, who knows where the jurors will go during their deliberations.

Graphics can help you make your story come alive to the jury. Remember the old adage: show, don't tell. In your opening statement, start with a timeline or chronology of key events and include blow-ups of important documents. Keep in mind that the most powerful use of graphics is to frame concepts. For example, use a chart to explain complex notions, such as the flow of funds, insurance set asides and reserves, or the rate at which water migrates through soil. A simple diagram will make these concepts understandable and memorable to the average juror. Words alone are not as memorable or persuasive as words with pictures. Use graphics so that jurors can see what you are saying.

Effective graphics adhere to the "billboard principle." A billboard gives you less than ten seconds, as you drive by, to understand the message. Marketers know that graphics need to convey their message immediately in order to be persuasive. Jurors should be able to understand a simple chart in six to ten seconds; if it takes longer to explain, change it or get rid of it. Use symbols and icons when possible, but make sure they aid recognition and understanding. Otherwise, they are "chart junk" and should be eliminated or your message will be lost on the jurors.

Make sure that the graphic is fully noticed by the jury; keep in mind that bigger is better. Not only is a large chart or diagram easier to read; it commands the jurors' attention and makes the message seem more important. If at all possible, test your graphics on a group of lay people for effect. Effective

demonstrative aids are expensive, so you want to invest wisely by first planning carefully the sorts of aids to bring to the courtroom.

### Opening Statement

All of the elements of persuasion are tied together in an opening statement. Openings are primarily about teaching. They should be clear, they should educate, and above all, they should be logical to jurors. Don't preach or lecture; teach. Don't waste the first precious moments of your opening statement with clichés like, "this is a roadmap," or the tired, overused jigsaw puzzle analogy. Worse yet, don't start by telling jurors that "this is an opening statement," which the judge has already told them. When attorneys do this, they waste their most powerful persuasive moments telling jurors what they already know.

Instead, begin with the theme. Tell the jury in no more than two or three sentences what the case is about. Then follow this simple thematic statement by back filling with information and detail. It is no different than introductory college English, which teaches you to tell your reader or audience what you intend to tell them, then tell them in more detail, and finally summarize what you have told them.

### Examining Witnesses

Witnesses are the key element in your effort to persuade the jury to identify with your case and decide on behalf of your client. No matter how persuasive the opening statement or closing argument, if key witnesses falter on the stand, your case crumbles. Current jury research shows that the single most important factor in jurors' decision-making process is witness testimony. Once it is understood that jurors make up their minds based on which witnesses are more credible, it becomes imperative to understand what jurors need and want from witnesses, so that you can prepare them to testify effectively.

Lawyers are trained to use the direct examination of witnesses to establish sets of facts. Jurors, however, need the connective fabric between the facts in order to identify with and be persuaded by witnesses. The facts that often are most important to the jury may seem totally unimportant to lawyers who are busy establishing one fact set and then moving on to the next. The guiding principle for the lawyer preparing direct examination questions, as well as in designing opening statements, should be to anticipate the images fleeting across jurors' minds, as well as the thoughts and feelings they experience as you are questioning the witness. Often this understanding of how the jury is reacting leads to additional commentary or questions that flesh out the story or help the jury understand why something happened the way it did. It is this additional information that fills in the story and gets the jurors nodding their heads sympathetically and accepting your witness as credible.

### Humanizing the Case

If you find it difficult to anticipate the details jurors will want from your opening statement or a particular witness, talk to some ordinary people. If possible, do a focus group. If not, give your opening statement to a waitress at the local diner or offer your auto mechanic, child care provider, and a friend who sells software a free meal in exchange for sitting in on a mock examination of your key witnesses. These are the people whose feedback will help you connect the dots for the jury.

Be careful about relying on feedback from colleagues and people who work at your firm. Even though they mean to be open-minded and give you unbiased feedback, they become jaded when they have worked in the legal world for a while.

A defense trial lawyer was preparing a Hungarian-born engineer who was accused of designing a defective water heater that blew up and seriously injured and killed several people. The lawyer believed that the jury would discount the engineer's testimony because of his strong foreign accent. Beginning to establish the facts, the lawyer asked the engineer where he was born and when he came to the United States; the engineer answered that he was born in Hungary and emigrated in 1956. Immediately following this, the lawyer asked about the witness' engineering education and work experience, from the time he got to this country until the present.

What the defense lawyer in this case did not seem to realize is that the typical juror would have unexamined questions fleeting through his or her mind, such as: Why did this man leave his homeland?

Why did he leave his family and friends to live in a foreign land? Was it a personal decision, or did something happen in Hungary that caused him to leave?

During an aside, the examining defense lawyer discovered that the engineer had been a freedom fighter and hero in the 1956 Hungarian revolution who fled the country just as he was about to be captured by the Russians. With just a few additional questions, the lawyer was able to humanize his client and help jurors experience him as a war hero who would never have consciously designed a defective product. The jurors' view that the engineer was a good man, as well as a believable witness, contributed to the defense verdict in this case.

#### Closing Argument

When the trial reaches the closing argument stage, the time for persuasion of the jury is long past. In more than 2,000 post-verdict interviews conducted by the authors, no juror has ever said they made up their mind during closing. Ninety percent of jurors make up their minds after listening to witnesses. The remaining jurors make up their minds during deliberations. If you haven't already connected the dots for the jurors, they have filled in the blanks and become invested in their own interpretation of the facts long before closing argument. That is why it is critical to front load everything possible into the opening statement and witness testimony, where you have the best chance of controlling and shaping the jury's perception of your case. During closing argument, arm the jurors with the information and tools they need to argue your case for you during deliberations.

Using the principles of persuasion outlined above, your case will be tighter psychologically because it incorporates how jurors view cases and what jurors want and need from lawyers.