



## 2022 INTERNATIONAL CLIENT SEMINAR

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Friends, Romans, Countrymen, Lend Me Your Ears!

*The Art of the Opening Statement*

Anthony Livoti

Moderator

MURPHY & GRANTLAND

Columbia, SC

awlivoti@murphygrantland.com

David Ortega

NAMAN, HOWELL, SMITH & LEE

San Antonio, Texas

dortega@nhsl.com

People gathered from all over the country to this place just outside the capital city. It was morning and there was an excited anticipation over the crowd. They greeted old friends and talked to new friends they made from the night before. The schedule for the upcoming day promised to teach and inform. This was about storytelling. What would they learn? What was there left to learn? Surely with all these people had been through, they knew enough about storytelling, didn't they? They had their own ideas of storytelling, and each had their own stories to tell. And told them they did. Stories about trials, about clients, about companies, about families. There was a din in the room as the people continued to talk and laugh. Music played before the session started. As people continued to fill the room, the time was approaching. The music died down, the room got darker, and suddenly people appeared on the stage. A hush came over the crowd. The story about storytelling was about to begin.

### **Telling the Story**

Opening statements are critical to the success of a trial. They are one of the most pivotal moments in a trial. Statistics show that 80% of jurors will reach their ultimate conclusion during the opening statements. What you say, what you communicate, and what you present to the jury in the first two minutes may have a greater impact on the verdict than any other two minutes in the case. In order to seize the moment, you must be prepared to grab the jury's attention, gain their trust, and satisfy their curiosity.

Developing and communicating the theme of your case early in your opening statement is crucial to connecting with a jury. "Themes are psychological anchors that jurors instinctively create and distill

and summarize what the case is all about.”<sup>1</sup> “Every case can, and should, be distilled into one, two, or no more than three themes that summarize your positions on the case in an engaging, easily remembered way. Sometimes a theme can be a single work; at other times a short phrase. Some cases can be summarized around a single theme, but many use different themes for different considerations, such as liability and damages issues.”<sup>2</sup> Storytelling helps the jury connect with your theme.

As Mauet notes, “effective opening statements are usually based on good storytelling. After all, a trial is essentially a contest to see which side’s version of a disputed event or events the jury will accept as true.”<sup>3</sup> Mauet gives three key aspects of storytelling: focus on people rather than the problem, recreate the scene with vivid and dramatic imagery, and organize the story simply and logically.<sup>4</sup> By using this effective storytelling in your opening statement you have an opportunity to persuade the jury that the outcome you seek is the right one before any evidence is presented. In the opening statement you have the opportunity to:

- Frame the issue that the jury will confront
- Lay out the narrative
- Introduce people, documents, terms, experts
- Create the emotional tone of the trial
- Define the ethical impact of the decision

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<sup>1</sup> Trial Techniques (4th Edition), Mauet, Thomas p. 44

<sup>2</sup> Id.

<sup>3</sup> Id. at 45

<sup>4</sup> Id.

### Difference Between Opening and Closing Statements

Black's Law Dictionary defines an opening statement: "A term that is given to the initial statement of the attorney to the judge or the judge to a jury." Opening statements are not a time for argument. But the experienced trial attorney knows the importance of conveying your themes without arguing your case. Storytelling is an effective way to do that.

How is an opening statement different from a closing argument? Obviously, one is a statement, and the other is an argument. In the opening you can state what the evidence will be, but not talk about what inferences can be drawn from the evidence. An opening statement helps a juror during the trial; what they should look for, how they should view the evidence and your client. A closing argument is intended to assist the juror during deliberations. A closing argument helps the jury come to a decision, where an opening statement guides the juror throughout the trial. An opening brings a juror through the history of the case through the close of evidence; a closing takes the juror from close of evidence to the signing of the verdict form.

### What are the Goals for the Opening Statement?

In telling a story, you want to ensure that the jury will understand what they hear. People learn from what they already know, so it is helpful to relate new information to a juror's prior experience. Part of a good opening statement is to build a basic framework on which they can later hang the details of the case: facts, terms, timelines, and cause and effect relationships.

You also want to ensure that the jury will believe what they hear. Help the jury understand the following:

- Why do witnesses know what they know
- Address any problem issues

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- At this point, attorney's credibility being judged
- Includes issues of morality, justice, fairness

Finally, you want to ensure that the jury will relate to what they hear. Focus on context, setting, personal aspects of the parties and emotional impact of your story.

### Two Thousand Years of History Can't Be Wrong

More than 2,000 years ago, Aristotle helped formulate key aspects of persuasion in his work *Rhetoric*. Author and Harvard instructor Carmine Gallo, writing in the Harvard Business Review, notes that the ideas of *logos*, *ethos*, and *pathos* are keys to persuasive writing and speaking. Incorporating them into your storytelling for opening statements will create a persuasive story to resonate with a jury.

Gallo starts by focusing on *ethos*, or character. This is the part of the speech or presentation “when your audience gains some insight into your credibility. Aristotle believed that if a speaker’s actions didn’t back their words, they would lose credibility, and ultimately, weaken their argument.”<sup>5</sup> To give an example, Gallo notes that leading civil rights attorney Bryan Stevenson doesn’t lead with his credentials, degrees, or awards. He tells his audience that he spends his time in low-income communities and prisons. By focusing on this, Stevenson establishes his character with his audience and begins to establish trust. Gallo notes that “a simple reminder that you are committed to the welfare of others will build credibility before you lay out your argument.”<sup>6</sup> We do this in story telling by focusing on credibility: our credibility as attorneys for our clients and the credibility of our clients to a jury. The use of *ethos* helps the trial lawyer to establish credibility with the jury in opening statement.

Once *ethos* is established, Gallo notes it is time to make a logical appeal to reason: this is *logos*.

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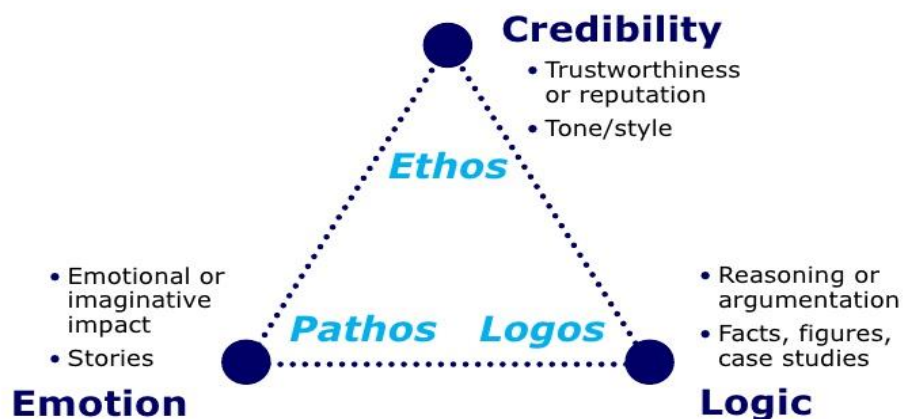
<sup>5</sup> Gallo, Carmine, [The Art of Persuasion Hasn't Changed in 2,000 Years](#), Harvard Business Review, July 15, 2019

<sup>6</sup> [Id.](#)

This is the time to use logic and reason in your storytelling to help the jury see how your story is rational and logical. Give the jury facts that they can connect to, points of reference that makes sense to them, and that appeal to their sense of reason.

*Pathos* or emotion moves people to action by how a speaker makes them feel. According to Gallo, “Aristotle believed the best way to transfer emotion from one person to another is through the rhetorical device of **storytelling**.”<sup>7</sup> This is where weaving emotion and connection in our openings can convey the idea of telling the jury a story and help persuade a jury early in the case. Helping to connect the jury on an emotion level with our client creates connection in the story we are telling.

## Aristotle’s rhetorical triangle



<http://sixminutes.dlugan.com/ethos-pathos-logos/>

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### Keeping it Short and Sweet

Sometimes as lawyers we think “why say in 10 words what we can say in 100 words.” But lawyers are the only ones who think like this! Brevity is the key, especially when it comes to telling a story that

<sup>7</sup> Id.

connects to a jury. Eliminating legal or technical jargon aids in our credibility or *ethos* with a jury. When we share ideas and themes about our case in an easily understood story, we gain credibility with the jury.

### Every Picture Tells a Story

Use of imagery to help tell our story also connects with a jury. When telling your story, think about creating a picture in a juror's mind for them to understand the setting, place, time, and nature of the case. Use of metaphor can also help paint a picture for the jury to imagine the story and what took place in your case.

Think back to the opening paragraph of this paper. It was an attempt to set the scene of attendees coming to the opening session of the ICS. Reading that opening likely put a picture in the reader's mind of what was to come. Telling our story using imagery, pathos, ethos, and logos gets a jury to connect with our client's story and gets us on the way to persuading the jury to see the case in favor of our client.

Each case is different so your opening may contain different elements of a story. But using this framework is helpful in telling a persuasive story to the jury.

### Key Questions to Ask in Preparing Opening

There are additional considerations for putting your story together:

- What is the "theme" of this case?
- What is the overall tone of the case?
- What words or imagery will support that tone?
- What are the key facts that the jury must believe in order to reach a favorable conclusion?
- What are the critical differences between Plaintiff and Defendant's position that the jury will be asked to decide?

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- What are the logical, emotional, or ethical barriers that must be overcome?
- What terms or technical concepts are going to be used frequently during the trial that the jury needs to understand?
- What dates or sequences must the jury understand?
- What documents will be key to your proof that jury should see in advance?
- What is your theme to tell the jury the story of your case?
- What is the setting?
- Who are the characters?
  - Protagonist
  - Antagonist
  - Supporting characters
- Is there a plot?
  - Suspense
  - Irony
  - Catharsis
- The Ask
  - What is the outcome that you want the jury to reach?
  - Do not state it in legal terms.
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### Delivery

- Different jurisdictions have rules on moving around the courtroom in front of the jury box or standing behind a lectern. Know what you are permitted to do under your local rules. Be familiar with the courtroom and set it up to make sure you are comfortable. Start when you are ready. Create drama.
- Come out of the gate at full speed.



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- Plaintiff has already done all the warm-up. By the time you get up, they are comfortable in the environment, engaged in the process, and ready to compare what they just heard to what you have to say.
- Get to the heart of the issue in the first minute.

Example: *Ladies and Gentlemen, if what you just heard from Mr. \_\_\_\_\_ was all there was to this case, you wouldn't need to be here. But you are here because we disagree. We are going to present four other witnesses who saw the Plaintiff cross the center line, leaving no opportunity for my client to avoid the collision. You are needed to decide which version of the facts is most likely true. As the judge told you, my name is . . .*

Don't write a script and don't read.

- Make an outline
- Memorize the first 2 minutes and don't look at your notes
- Refer to outline occasionally

Keep visuals simple.

- The attention needs to be on you.
- Too much information is distracting because they don't yet have enough information

Avoid spending much time discussing mechanical aspects of trial.

- Process of trial
- Burden of proof
- What attorneys say is not evidence

Don't overuse: "The evidence will show . . ."

Most importantly, be yourself.