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From Opening to Summation, Making First Impressions Count

By Ben Rubinowitz and Evan Torgan

There is an old adage that every trial lawyer should accept as gospel: "You don't get a second chance to make a first impression." Keeping this maxim in mind, attorneys must strive to make a winning impression early on in the trial so they can use that impression to set the tone for each phase of the remainder of the trial.

Trial lawyers frequently do not appreciate the importance of first impressions and fail to seize the opportunity to make a strong one. For example, it is a waste of valuable time to begin an opening statement by telling the jury that the "opening statement is like a road map" or that "an opening statement is like a table of contents." Even worse is the statement made by some lawyers that, "an opening statement is not evidence and nothing I say should be viewed as evidence." Lawyers who make such statements undercut their credibility from the start and have essentially told the jury, "I'm either going to bore you to death or I have nothing of value to tell you."

The importance of making a strong first impression applies to every stage of the trial. It is made plain by the psychological concepts of primacy and recency. Trial attorneys who adhere to the concepts of primacy and recency believe that what jurors hear first and last is what they will remember the most.

Opening Statements

Consider the difference in the following two opening statements. The first is delivered in what many believe is the proper or conventional way to open:

Ladies and gentlemen, in the next few minutes I have the privilege of making an opening statement to you. This statement is very much like a road map or table of contents of what is about to unfold. It is important to remember that what I say, and what my adversary says, is not evidence. The proof in this case will come from the lips of the witnesses and the exhibits that are offered in evidence.

The problem with this opening is that the attorney wastes precious time. He tells the jury nothing about the case and thereby misses his opportunity to make a good first impression. The only information the jurors are told is that they should not listen to the attorney because he has nothing of value to say. Contrast that opening statement with the following one, which grabs the attention of the jurors and makes the most of the opportunity:

Ladies and gentlemen, a man was hurt. A man was severely injured. A man was crushed by a bus. And when he was crushed by that bus his 10-year-old son was standing next to him. His son saw him suffering. His son saw him bleeding. Bleeding from his mouth, his nose and, more importantly, from his ears. The son held his father, cradled him, and cradled his head as his father gasped for air, trying to speak, breathing his last breaths. That man died in his son's arms. And there is a reason that man died. And the reason he died is because of negligence. The reason he died is because of carelessness. Negligence and carelessness on the part of the bus driver not only in what he did but also in what he did not do. In what he failed to do. In failing to see that which was there to be seen. That driver was, simply put, not paying attention.

An impact opening statement like that will grab the jurors' attention. If the trial attorney delivers it properly, with righteous indignation and proper intonation, the statement will serve to set the tone for the rest of the trial. But impact openings do not only work for plaintiffs. Defense lawyers can equally and effectively use the same concept to work to their advantage. Consider the following opening by a defense attorney delivered immediately after a plaintiff's attorney described a terrible accident where a child was struck by a car:

Ladies and gentlemen, this is a case about an accident that should not have happened. And it is a case about a child who was injured. But it is also a case about a driver's worst nightmare. It's a case about a child who did not cross at the crosswalk. It's about a child who did not cross at the corner. It's a case about a child who darted out into the street from between two parked cars when there was no time to react. And it's a case about a child who never looked, a child who never looked before crossing—a child who never looked before running into the street.

Witness Examination

The importance of the initial impression is not limited to opening statements. Equally important is the initial impression created during witness examination. Many attorneys start their direct examination with a "one-size-fits-all" approach. The examination follows a set format starting with the development of pedigree information before describing any part of the significant events that are truly at issue in the case. But by using this approach the examination loses its punch and often serves to bore the jurors. The important issues are buried somewhere in the middle. Consider the differences in the start of the following two direct examinations:

Q: How old are you?

Q: Where do you live?

Q: Where did you grow up?
Q: Where did you go to school?
Q: When did you start working?
Q: What jobs have you had in the past?
Here, although the form of the questions is proper, the answers to these questions do little to advance the case or grab the attention of the jurors. Indeed the "yawn factor" comes into play with such a beginning to the direct exam. The better strategy, and one that follows the concepts of "primacy and recency," is to develop an 'impact direct' by immediately focusing on an important issue and then linking it back to the pedigree information. An impact direct might start like this:
Q: What medications are you taking today?
Q: Why are you taking these medications?
A: For pain.
Q. For how long have you been in pain?
A: Since the accident.
Q: Describe the pain.
Q: Had you ever felt pain like that before the accident?
Q: How old were you when you first experienced this pain?
Q: How old are you today?
Q: Has the pain affected your ability to work?
Q: How has the pain affected your ability to work?
Q: Before you were injured in this accident what pain, if any, did you have while working?
Clearly, all of the pedigree information must be brought out on direct. However, the manner in which it is brought out can make a significant and memorable difference to the jurors. The goal is to capture the attention of the jury by presenting the events in a compelling manner at an appropriate point in time. And just as it is important to start the direct exam with power (primacy), it is equally important to end the direct with power (recency). Here, the attorney might return to a powerful issue before ending the exam and reinforce the import of those initial questions.
Q: When was the last time you had a day without pain?
Q: What type of pain, if any, do you have at night?
Q: How, if at all, does it affect your sleep?
Q: When were you last able to sleep through the night without pain?
Q: For how long have you had this pain during the day?
Q: How does the pain differ, if at all, between the way you feel during the day and at night?
Q: What medications have you taken since the accident?

Q: Why do you take these medications?
Q: What happens when you don't take the pain killers?
Q: What do you want for the future?
Using the theory of primacy and recency to sandwich the often dull pedigree information thereby allows the trial attorney to effectively and persuasively tell her client's story.

Cross-Examination

Just as it is important to grab the attention of the jury on direct examination, it is equally important to grab their attention on cross. While there are many ways to develop facts on cross, the attorney should always focus the jury's attention on the more important issues both early on and again at the end of the cross so the significance of the crucial facts is not lost. Imagine the initial scenario, outlined above, in which a man was struck by a bus while walking with his son. The attorney could question the bus driver by focusing on his driving experience. However, that approach might take up too much time at a point in the examination when the jurors' attention span was at its greatest:
Q: You have driven buses for 20 years, correct?
Q: You have driven an MCI bus for five years, right?
Q: The bus is 40 feet long, true?
Q: Eight feet wide?
Q: It weighs 40,000 pounds, correct?
Q: It has two mirrors on the left, true?
Q: And it has two mirrors on the right, correct?
While all of these questions are important, the bus driver's careless acts and omissions might be even more important to the case. By holding off on the above questions until later in the exam and driving home an important point early on, the attorney can capture the jury's attention and a key summation point. Imagine starting the cross by asking the following questions:
Q: You never saw Mr. Smith, true?
Q: You never saw his son, right?
Q: You learned they were in the crosswalk, didn't you?
Q: But only after you felt a bump, true?
Q: And then you heard a scream, right?
Q: When you felt the "bump" you weren't looking in the crosswalk?
Q: But you were trained to constantly scan, true?

Q: Scan for pedestrians, true?
Q: And even though you were trained to scan for pedestrians you never saw either pedestrian, true?
Q: The bus you were driving weighed 40,000 pounds, correct?

Summation

After making a strong impression and sustaining that impression throughout the trial, attorneys must use the summation to bring all their winning points home and defuse adverse arguments. The concepts of primacy and recency must again be considered to prepare the closing argument. To properly create the argument, a thorough grasp of the court's jury instructions must be understood and reviewed before ever standing up to deliver the summation.
Once the jury instructions are reviewed, the argument must start strong, immediately capturing the jury's attention, and then end strong. Consider the contrast between the following arguments on summation at the start of the argument:
Ladies and gentlemen, I now have the opportunity to deliver my summation to you. This is the time when I will discuss with you my thoughts about the case. But it is important that you not make up your mind until you have heard the judge's instructions on the law. I want to thank you for serving as jurors. I know this has been a long and tedious process, but your presence here and your patience are appreciated by all of us.
If we scrutinize the beginning of this summation it serves little purpose. It might be polite, but it does not advance a single winning argument in the case. In contrast, consider the following initial argument forcefully delivered with appropriate rhetorical questions and a thorough understanding of the applicable law designed to enhance the client's cause:
Why didn't the bus driver see Mr. Smith? And why didn't the bus driver see his son? They were on the corner. They were there to be seen. They stepped into the crosswalk before the bus even entered the intersection. And they were walking in the crosswalk when Mr. Smith was crushed in front of his son. They were doing everything they were supposed to be doing—crossing in the crosswalk with the light in their favor. So why didn't the bus driver slow down? Why didn't he yield for them in the crosswalk? Because he wasn't paying attention. He wasn't looking. He was distracted. And in his distraction he failed to see that which was there to be seen.
The trial attorney must start and end her trial on a strong note. By seizing the opportunity to make a strong first impression during an opening statement, the attorney lays the groundwork to hold the jury's attention throughout the trial. Using the concepts of primacy and recency

during all stages of the trial—opening, direct, cross, and summation—allows an attorney to maintain this positive impression. Highlighting the most important facts of a case to the jury in the most memorable way possible instead of burying key facts can make all the difference. You only have one chance to make a good first impression—seize the opportunity and make the most of it.

Ben Rubinowitz is a partner at Gair, Gair, Conason, Steigman, Mackauf, Bloom & Rubinowitz; he can be reached at speak2ben@aol.com. Evan Torgan is a member of Torgan & Cooper; he can be reached at etorgan@torgancooper.com. Peter J. Saghir, a partner at Gair Gair, assisted in the preparation of this article.