

LCA Commentary's June 2009 Jury Tip

“Persuasion, not minutiae”

Jury verdicts should be decided on the evidence, but the evidence is less important to your jurors' decision-making than their impressions of credibility, their ideas about common sense, their values, their sense of fairness, and the predispositions they bring with them into the courtroom. These are lessons I've shared with you before—that trials are about the evidence, but not as much as you might think, and not in the way that you might imagine. As I've said before, jurors merely use the evidence to support what they already believe to be true and then use that evidence to convince other jurors in deliberations. You won't win a jury trial without supporting evidence, but the evidence itself does not persuade your jurors.

In the same way, trials are about the details, but not as much as you might think, and not in the way that you might imagine. You won't win a jury trial without wading into the details—educating your jurors about medical procedures, business practices, or crime scene forensics, for example—but the details themselves won't persuade your jurors. Even worse, getting into those complicating details—the minutiae of trial—during your opening statement will derail the persuasive process, and you'll have wasted your best (and perhaps only) opportunity to win over your jury.

Jurors find trials interesting, even the most dry, technical cases. Yes, even patent and contract cases. You might not think so if you've watched a jury watching a trial; you've probably seen jurors falling asleep, eyes glazing over, notepads ignored. You might be surprised to hear that the same sleepy jurors sitting through mock trials—even short, one day mock trials—are actually fascinated with the case itself. They perk up and become animated, even personally invested, during mock jury deliberations. The overwhelming majority of the jurors I talk with after actual trials are just as riveted by the trials they sat (or slept) through. So if they're so interested in these cases, why do they look so bored during most of the trial?

The devil is in the details. Jurors find the minutiae of trial boring, confusing, and hard to connect with the big picture. One way or another, you'll still need to spoon feed the details and minutiae to your jury. But you should NEVER get into the minutiae during your opening statement. Let's discuss why.

Think about the timing of your opening statement. You'll deliver it during the “framing” phase of your jurors' decision-making, the time in which they are open to persuasion, wondering what the case is about and looking for clues to help them decide which side is telling the truth and which side is being dishonest or unreasonable. In a nutshell, your jurors spend your entire opening statement comparing what you're saying to what they already believe to be true, what they believe to be likely, what they believe makes sense,

and what they believe to be fair. You do NOT have their full attention, and I can't stress this enough. Opening statement is NOT the time to educate or confuse your jurors. The jurors are too focused on scrutinizing the validity and credibility of what you're saying to be learning new things. When you distract the jurors with the minutiae of your case, they are forced to stop focusing on credibility and judgment and are no longer being persuaded. The details and minutiae derail the best and only purpose of your opening statement: persuasion.

A successful opening statement cannot and should not leave your jurors with a working knowledge and complex understanding of your evidence. You shouldn't want, or need, your jurors to take notes during an opening. Lucky for you, most judges don't allow notes in opening anyway. These judges are doing you a favor.

A successful opening should leave your jurors with an unshakeable impression that your case makes sense and a clear idea of why. Your opening should frame the case on your terms, focusing your jurors on what you want to be important and distracting them from what you don't want them to focus on. Don't expect your jurors to remember the details after hearing your opening statement. They won't. A good opening is like a persuasive political speech—your jurors should remember that they agreed with your values, that you made sense, that you were fair, and that they found you convincing without having to remember why.

Never turn your opening statement into a table of contents, rattling off evidence without explaining to the jurors what the evidence means. This is like emptying the box of a jigsaw puzzle in front of someone and expecting them to see the picture. Never turn your opening statement into a complicated, educational lecture about the complex issue your case involves. I understand why it seems important to educate your jurors early on about the subjects they'll be hearing about throughout trial, but you must understand that there isn't enough time in a six-week trial to make your jurors capable of making educated, informed decisions about how a physician should treat a myocardial infarction or corporate obligations under Sarbanes-Oxley. Not only will you confuse and bore the jury, you'll have wasted your only opportunity to persuade them.

In next month's tip, I'll discuss some ways of persuading jurors without getting into the details. For the time being, remember what you should be focusing on in voir dire—keeping your jurors focused on the big picture and the reasons your case makes sense instead of distracting and confusing them with the details and minutiae.

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