# 2. OPENING STATEMENT

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU: PART 15
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[redacted]

INDEX NO. [redacted]

Plaintiff,

- against -

Plaintiff's Opening
Defendants' Opening

[redacted]

COPY

Defendants
----------X

Mineola, New York
September 4, [redacted]

B E F O R E: HON. STEPHEN A. BUCARIA,
Supreme Court Justice and a Jury.

A P P E A R A N C E S:

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Thomas Basile
Official Court Reporter

MR. DEAN: Thank you, Your Honor. May it please the Court.

Jurors, thank you for coming back. All of you are here and on time and we appreciate that. It is so necessary for you to participate in this incredibly important trial.

Everything the Judge told you is true, and it will be in your hands that the fate of the [redacted] family lies at the end of this case. But you know, we really shouldn't even be here. This tragedy could have been so easily avoided. You will see, and I promise you that you will see, that on each and every occasion over the 18 months that the employees of the [redacted] [redacted]treated [redacted], on each one of those occasions, Maria Murphy had a brain tumor, and on each one of those occasions over 18 months, they didn't diagnose it. And on each one of those occasions her brain tumor was easily diagnosable. I promise you that I will show you that.

You may say, easily diagnosable? Yes, easily diagnosable, her brain tumor, and how do I know this? They have even admitted it. There

are examinations before trial in this case, and I promise you, you will see us soon enough refer to those examinations in which they have admitted, and we know this is what our experts are going to say, that [redacted] brain tumor could have easily been diagnosed. She died from its removal. We'll get into that in a minute. But it was so easy to diagnose her brain tumor. How? By an invasive test? No. By cutting her open? No. By harming her? In no way. All they had to do, and all good medical practice demanded that they do, was to have an MRI of her brain. And all of us have known people or have endured -- endure; it's nothing to endure, it's nothing harmful -- an MRI of some sort. Whether it's a brain or whether it's a back or whether it's a knee or part of a body. MRIs are non-invasive. MRIs don't hurt. MRIs are easy and certainly in this case would have diagnosed her brain tumor. There isn't any question about it. And that's what she had, a brain tumor. And they blew the diagnosis. She came in -- and I promise you I will show you this in just a minute -- she came in with a condition that

showed that had they diagnosed it, it could, it would have been resolvable and they didn't do it. Wait till you hear what they did do.

I promise you that I will show you that because of the negligence of the employees of the defendant medical group, because of the negligence of [redacted] the family practitioner, because of the negligence of [redacted], the neurologist, [redacted] lost a 36 year old wife who was his soulmate. And [redacted] lost a mother who adored her children, and [redacted] and [redacted] lost a beloved daughter, and it didn't have to be. It didn't have to be and I promise you that I will show you that.

[redacted] in July of [redacted] came into the medical group complaining of dizziness, complaining of vertigo, complaining of loss of balance and complaining of numbness in her arms and legs, in her hands and legs. Now, this is serious business. This is something that, as you will see, that doctors have to deal with and say why is this? Why is there a loss of balance? And by the way, I'm just not making

this up, it's in the records and you will see the records. The records and those big white things are blowups of the records. The records have already been introduced into evidence and we'll deal with that when the first witness is called. But you will see that in the records. She comes in saying, I'm dizzy, I have lost my balance, I have numbness in my hands and numbness in my legs. Something is wrong, obviously. So initially, what they do is they think maybe because there's this loss of balancing maybe it's her ears, let's clean out her ears, and they do that and have her looked at and they know it's not her ears.

Now, let me make this very clear. We're not saying that just because someone has a loss of balance that means automatically they have a brain tumor. We're not saying that. We're saying that a brain tumor can be one of the reasons for dizziness and vertigo -- that's a fancy word for that -- and loss of balance, and we're saying if you have these signs you've got to look for it. You've got to do something. Wait until you hear what they did. But when

someone comes in and makes these complaints they have to treat it seriously.

On the [redacted] day of [redacted] of [redacted] [redacted] went to [redacted] [redacted] who thought that she may have this problem with her ears causing the dizziness and [redacted] [redacted] referred her to a doctor to be sure it wasn't her ears and it wasn't. [redacted] [redacted] also said she should have x-rays of a word you're going to be hearing about throughout this trial, cervical. Cervical is a fancy word for neck. C-e-r-v-i-c-a-l, if you hear that word, all it means is the neck area. You will hear the world cervical spine and that's the portion of the spine that's where your neck is. Cervical. So they had x-rays taken on I think the 22nd of August and those x-rays were negative. The spine was fine. There were no problems with the spine. It was -- the pieces of the spine were on properly, they weren't moved, they weren't tilted. There was a proper space between them. Everything, I promise you, you will see with regard to those x-rays shows that her spine is okay.

She calls, [redacted] called [redacted] [redacted] on the

third of September of that year and says, I'm a little less dizzy but my right arm is numb. And [redacted], instead of saying see a neurologist, instead of pursuing it, says, well, you should have physical therapy. We say that's wrong. You got something with dizziness, you got something with numbness, this is a neurological problem that neurologists have to deal with and evaluate and say what is wrong, what could be wrong?

Three months pass and on the fourth of December of [redacted] goes to [redacted]. [redacted] is a neurologist. We don't know how she got there because no one knows whether it was [redacted] idea and, again, both of these people are employees, they're all employees of the medical group, this HIP group. That's why they're sued, because of the negligence of the employees is attributable to the group itself. The Judge will tell you that at the end of this case. So we don't have to deal with that now, but I assure you that this is what you will see.

[redacted], the neurologist, evaluates [redacted] and [redacted] says that for the only time

in the 16 or more times that he sees Maria over 13 months does he think, well, maybe she has a brain tumor. But he then discounts that. I don't know why, because she does have a brain tumor and as he has admitted, that brain tumor could have been diagnosed had it been done, the MRI of the brain. But he says, well, there may be a number of reasons for [redacted] dizziness. Why do I know this is what he says? Because I asked him. Because I took his examination and he says, well, dizziness could be caused and loss of balance, all those problems could be caused by problems with the inner ear. But there weren't any, so that's discarded. It could be caused by vascular, that is, blood problems. But there were not any, so that's discarded. It could be caused by trauma, that is, an accident of some kind. But there wasn't any, so that's discarded. It could be toxins, but that's discarded. It could be a drug side effect, but that's discarded. It could be a stroke, but she didn't have a stroke so there are only two things left: A brain tumor which she had, or something called a postural strain.

That is some kind of strain from the posture that you're in. And [redacted] the neurologist, says, the reason for your problems, Maria, the reason for your dizziness and your loss of balance and your numbness is the way you are holding the telephone. That's what he said. He says you have -- you're using a telephone at work and the way you are holding that telephone has caused your problems. So how does he treat a woman who has a brain tumor? Ready? He puts her in traction. He hangs her by her neck over the door putting weights on the other side and that's how he treats a woman with a brain tumor.

Now, they're going to say, well, we didn't know she had a brain tumor and we say, but you should have because you have to explore this. If there are two choices, one is a brain tumor that can and did kill her and the other is holding a phone at your ear, how about deciding and doing what you have to do to be sure it's not a brain tumor? Is that too much to ask we say, [redacted], and the answer, say our experts and says your common sense, is no. That is not too much to ask because -- and I promise you

that you're going to get medical testimony for this -- but you know this just as well as any doctor. When it comes to brain tumors, sooner is better than later to diagnose. If you've got a brain tumor and you know what brain tumors do, the sooner you find out about it the better off a patient is going to be.

Now, if there's something wrong with that logic, maybe you can tell me it at end of this case. But doesn't that figure? The sooner you diagnose a brain tumor the better off you're going to be.

MR. FUREY: Objection. This is argument.

MR. DEAN: That's what the evidence is going to be.

THE COURT: Overruled.

MR. DEAN: I promise you that's what the evidence will be.

Remember, as I told you in jury selection, as I represent to you now, we're not talking about cancer. We're not talking about a malignancy. We are talking about -- and I hesitate to use this word because it's so strange -- benign brain tumor. There is no such

thing as a benign brain tumor, but you'll hear the word benign as opposed to malignant. You'll hear the word benign because it's not cancer. But she has a brain tumor and that brain tumor is changing her brain because brain tumors do this in two ways. In your brain within the confines of the skull there is brain tissue and blood and cerebrospinal fluid. You'll hear more of this later. If something foreign is introduced into your brain like a tumor, that disrupts things in two grounds. It changes the chemistry of the brain by the way, as well as, as you can understand, as the tumor gets larger, portions of the brain are pushed aside and damaged and that's what happened.

On the second day of April of [redacted] had brain surgery which was unsuccessful. That brain surgery was performed by competent doctors. There is no claim now or ever against the skilled and dedicated brain surgeons who did their best to do the right thing for [redacted] We never have and never will say they were responsible. Who is responsible? Who are responsible are the doctors who never diagnosed

her condition for all those months beforehand while that brain tumor was growing and displacing certain portions of brain tissue and disrupting the brain itself. But what happened in the surgery was almost the same thing as what happens when you take a can of soda and you open up that top of the can. Sometimes the soda spills out and shoots up. And when they opened her brain, when they opened up her skull, the brain expanded and bled so that there was nothing they could do about it. It wasn't their fault. And they couldn't stop the bleeding. They sewed her up and eleven days later she died. It was not an easy eleven days, as you can imagine for the family, and at one point Jim and [redacted] father were at her bedside and they saw her open her eyes and they felt she was saying goodbye to them. On the 13th of [redacted] at that time she died. 36 years old. Wife and mother. Never should have been.

It was the summer of 1979 when they met. [redacted] was 18, just graduated from high school, and [redacted] was 17, dark haired, dark eyes, laughing, vivacious, delight to be with, and they met when

they worked in the same store in the same deli department and they became friends. He 18, she 17. And after awhile, he started to ask her out and she said no. She didn't think her parents would approve. They were a kind of old fashioned, old line. She, [redacted], a different society and culture, and he kept on asking her out and she kept on saying no. And then he stopped asking her and not too long after that she came to him and she said, I'd like you to meet my family and he said okay. And he went and met the family and they started to date and became engaged and two years later, in May of [redacted] they married. Not too long after that, [redacted] was born, that's [redacted] and then thereafter [redacted] and [redacted] did everything that you would expect her to do, took care of the kids, she did everything in the home and she worked. She became a travel agent, worked full-time, took care of the kids full-time. Moms can do that, you know; I don't know how but they can. And it was a good life for them. The families did things together until she went to see the defendant HIP and

these two doctors. And then everything changed.

We are not saying the defendants caused the brain tumor, of course not. But they allowed it to remain undiagnosed. They can't deny that. Each and every one of those visits that [redacted] went to the group, whether it was [redacted], who she saw maybe a half dozen times, or [redacted] the neurologist who she saw at least 16 times, each and every time she had that brain tumor, each and every time it was undiagnosed. Every time. They never, ever did the test. By the way, at one point they did a CAT scan of her cervical spine and that CAT scan was negative so you have a negative x-ray because they tried to figure out why this numbness, why this dizziness? You have a negative x-ray of the neck, cervical spine, and a CAT scan negative, so it wasn't that. Why didn't they, our experts say, do what they should have? What they should have done was the MRI because that would have shown it and it is serious business to a neurologist, and should be to a family practitioner like [redacted], when someone comes to them with numbness and dizziness and loss of

balance. This is no fooling around matter. We're not talking about your wrist hurting, not that that's not bad. We're not talking about a little ache in your back, as I have as I get older, or anything like that. We are talking about loss of balance and numbness and this, as you will see, was caused by what was growing inside her brain, that they never diagnosed and they should have diagnosed.

Now, how it was diagnosed? They changed their HIP plan. They didn't have HIP any longer in January of [redacted] So they went to another doctor because it was another plan and that doctor says, wait a minute, you've got this numbness, you've got this loss of balance. I'll send you to a neurologist and you know what that neurologist ordered? Right. An MRI of her brain. That's what good medical practice was done by somebody else and that's what showed it. That MRI of the brain that was taken in February of [redacted] showed that which they should have diagnosed. It showed that brain tumor. How do we -- the defense in this case is going to be -- and this is part of our evidence -- the defense

in this case is going to be, didn't make any difference whether we diagnosed it in 1996 or 1998. So what? Her chances or lack of chances of recovery from that surgery are going to be the same. That's what they're going to say. Show me. That's not so because she did change. You know what happened? When we see the changes, the evidence of these changes and the changes in the tumor itself, because what happens is that at either the end of '97 or the beginning of '98 there are changes showing the change in the tumor. How the tumor is changed, which could have been prevented had they diagnosed it. Her eye starts to jump up and down. That's a bad sign. She starts to drool. Her voice has become hoarse. You will see that was caused by the brain tumor expanding. And her tongue, and there's a medical reason for it, becomes misshapen. That's the fourth thing that I can think of just right now, four examples of change in that tumor. The tumor that should have been diagnosed that wasn't. Had it been diagnosed, they would have operated earlier and had they operated earlier chances for survival

were so much greater.

Experts are going to tell you that. We'll have expert neurologists, who will say you've got to give her, given these symptoms of loss of balance, given these symptoms, you've got to do right away an MRI of a brain. You have to do that. You can't just say, put her in traction, stick her, hang her from a door as he did. And you know something? As [redacted] came back and came back visit after visit, you know what [redacted] was doing? He was increasing the traction. So hang her more. Increase the weights. That's some treatment for a brain tumor. He didn't know it was a brain tumor. Well, you should have.

MR. FUREY: Objection, Your Honor.

MR. DEAN: I'm almost finished, respectfully, Judge.

THE COURT: Go on.

MR. DEAN: So, you hear a neurosurgeon saying had it been diagnosed earlier her chances of survival were so much greater and they should have diagnosed it earlier. Depending upon the evidence, you may or may not hear an internist

say the same things, [redacted] should have done certain things. She didn't do it. You'll hear an economist say something that I don't want you to find any way offensive. He's going to try to put a dollar and cents amount not only on the lost wages, which is easy enough, but also on the things that a housewife and mom does around the house. It's imperfect but it's the best we can do.

But the most we can do is to remind you about the loss have a wife and a mother and the loss of a mother's care and a mother's guidance. What does it mean to the children? Because as terrific a guy as [redacted] is, as loving a father as he is, he's not a mother.

THE COURT: Mr. Furey.

MR. FUREY: Thank you, Your Honor.

Afternoon, ladies and gentlemen, Your Honor, Mr. Dean.

I represent [redacted] and [redacted]. Like you will hold the fate of the Murphy family in this case, you will also hold the fate of the doctors in your hands. I'll be talking to you this afternoon about who my

**The Opening Statement in the Herniated Disc Case**

**By Ben Rubinowitz and Evan Torgan**

Although at one time, the law recognized a herniated disc for what it was – a significant and debilitating injury, today, with the statutory threshold requirements of Insurance Law § 5102, the plaintiff is faced with a difficult task. The plaintiff must convince a jury of the "seriousness" of this type of injury. Given the time restrictions on voir dire, the first real opportunity to explain the nature of this type of injury is through a thoughtful and detailed opening statement on the anatomical features of the herniated disc and the debilitating physical limitations resulting from such an injury.

The opening statement is a critical juncture in the case. It sets the stage for impressing the jury of the righteousness of your client's cause. Start with an introduction that encapsulates the entire case in just a few seconds:

> On September 14th, 2002 Paula Plaintiff knew she had been rear ended. What she didn't know at that time was that her spinal column would be permanently damaged. What she didn't know at that time is that she would sustain herniated discs. And what she didn't know and couldn't possibly have known is that those herniated discs would affect not just her spine but her whole body. What Paula now knows is that one day she will require surgery for those herniated discs. What she now knows is that she will require a life-time of physical therapy for those spinal injuries. And what she now knows is that her life will never, ever, be the same. Through no fault of her own, Paula has suffered injuries that have changed her life, injuries that will remain with her for the rest of her life.

The next thing you have to do is introduce your client, as well as the defendants. Toward that end, you must humanize your client, and to the extent possible, dehumanize the defendants. Let the jury know who your client is and, more importantly, who she was before the incident that compromised her health:

> You know by now that I represent Paula Plaintiff. She is the plaintiff--the one bringing the lawsuit. Permit me to tell you a little bit about her, because to first understand how the injuries have affected the woman, you must first understand the woman.

Then tell the jury what she was like before the accident that changed her life; her enjoyment of physical activity, exercise and time spent with her family. Describe her children's reliance on her, how she strove to achieve success in her vocation through education and hard work. Explain how her relationships with her husband, her children and her co-workers have forever changed:

> Paula worked hard to get where she was in life. Since she was a little girl, she wanted one thing, and one thing only: to become a nurse. And she worked hard to reach that end. While still in high school she worked at a local community hospital as a candy striper, assisting patients with their needs. She got good grades in high school so that she could get into a top nursing program in college. After graduating with a college degree, she received post-graduate degrees in nursing and finally became a Registered Nurse. She has taken care of patients for the last ten years, and enjoys her job.
>
> Prior to this incident, she was able to work twelve hour shifts and provide for her household. Although she was proud of her status as a registered nurse, she bore no greater title than that of "mom." Unfortunately, because of this accident and the resulting injuries to her spinal column, she is limited in what she can do for her children. She cannot play with them as she once did, do their laundry or even help them with their homework.

While it is important to generally describe the injuries to your client in a manner that promotes your cause, you must also deal with the weaknesses in your case and portray them in a light most favorable to your client. Common weaknesses such as the failure to wear a seatbelt, a low speed impact, minor damage to the vehicles or a failure to seek immediate medical treatment, must be addressed during the plaintiff's opening in anticipation of the defendant's opening:

> Paula was helping to transport a stroke patient from one hospital to another at the time of this incident. She was sitting in the front passenger seat of the ambulette without her seatbelt. But because of her concern for her patient in the back seat, she was facing toward the rear, clearly not bracing for an accident. So although the defendants will testify that the impact was low velocity -- and you'll see the damage to the vehicles was minor -- Paula was in a very awkward position. Her neck was turned partially to the side and rear. The impact -- which was in the specific compartment where she was sitting -- caused her neck to twist and compress from side to side.
>
> Because it was a side impact, a seatbelt would not have helped her. That is because she was sitting right next to the door and the force of the truck actually came into her body. No seatbelt would have prevented her injuries – particularly her injuries caused by the forces of extension and flexion. Moreover, because of her concern with her patient in the back seat, Paula was not braced for the accident. Paula was right at the center of impact and couldn't possibly have seen it coming. A police officer got to the scene almost immediately and asked if anyone was hurt. Although Paula was injured, she refused an ambulance and refused medical treatment at the scene. She told the police officer she was fine – for two reasons. The first was, she thought she was fine, just shaken up. For Paula, because of the accident and her injury, her adrenaline had kicked in: the body's natural fright or flight response. When someone is injured, the body secretes epinephrine or adrenaline, which allows a person to carry on until they are in a position of relative safety. So Paula told the officer she did not need an ambulance. Second, and more importantly, there wasn't a chance Paula the nurse would ever leave that patient behind. She wanted to ensure that her patient safely arrived at the hospital that could care for her. And she did just that.
>
> When she finally went home, despite the fact that she was hurting, she did not go to her doctor, although obviously as a nurse, she had easy access to medical treatment. Her next order of business was to take care of her two little girls who had arrived home from school. She took Advil and carried on with her obligations as a mother. The last thing she wanted to do was worry her children. Unfortunately, things got worse for her overnight. Paula couldn't sleep. She had difficulty moving. The pain, which had originally been localized to her neck, started radiating or traveling down her arm into the fingers of her right hand.

In any opening statement involving physical injuries it is imperative that you outline the injuries in great detail. That being said, however, you should never overstate them. To be able to properly explain your client's injuries you have to explain the relevant anatomy to the jury:

To understand what these herniated discs are you first have to understand the anatomy, so bear with me while I go through it briefly. As I said earlier, Paula has injured portions of her spinal column. The spinal column protects the spinal cord which is an extension of the brain. Just as the brain is protected by the skull, the spinal cord, which is the nerve center of the body, is protected by the spinal column which consists of bone, known as vertebral bodies. The spinal column consists of three areas: the neck or cervical spine; the mid back, which has twelve ribs attached to it, known as the thoracic or dorsal spine; and the low back known as the lumbar spine or lumbosacral spine. Paula suffered a herniated disc at two places, the cervical spine and the lumbar spine, known as the C6-C7 level and the L5-S1 level. The neck has seven cervical vertebral bodies, the thoracic spine has twelve vertebral bodies and the lumbar spine has five vertebral bodies. These vertebral bodies are hard, and are actually bones. Just as the spinal cord needs to be protected by the vertebral bodies of the spinal column, the vertebral bodies are protected by the discs. In between each bone or vertebral body is a substance known as a disc. And those discs actually act as shock absorbers for the vertebral bodies. The discs are what give us the ability to jump, flex and bend. They act as cushions for the bone, so without those discs we would have bone constantly rubbing on bone which would cause great pain, bone spurring and arthritis.

These discs consist essentially of two major parts. The outer shell known as the annulus fibrosis or more simply as the annulus. The inner portion is known as the nucleus pulposus, or the nucleus. The outer shell, the annulus, is the hard portion. It is not as hard as bone, but much harder than skin or muscle. It is a cartilaginous substance like the cartilage in our noses or knees. It is actually known as fibrocartilage

The inner substance or the nucleus is made primarily of water and is soft or gelatinous. It is that portion of the disc that provides the cushioning or shock absorption qualities.

So to visualize a disc it may be a good idea to picture a stale jelly donut. The crusty part of the donut is the annulus fibrosis and the jelly on the inside is the nucleus pulposus.

Now that you have laid out the general anatomy, tie it in with your client and demonstrate the actual injury itself by going through the medical explanation of a herniated disc:

The word herniated is derived from the word hernia, meaning a portion of the body is displaced to an area where it should not be. A herniated disc takes place when the nucleus pulposus breaks through the outer layer known as the annulus fibrosis.

It is not enough to describe a herniated disc. You have to explain to the jury why it is painful and physically debilitating:

> Now let me tell you why this disc herniation is causing Paula tremendous pain. The annulus itself has nerve fibers in it. This is causing Paula localized neck pain, just from the tear in the annulus itself. But what makes matters worse, is that the disc is herniated posteriorly and laterally, or toward the back and to the side. The implications for Paula are devastating. Because the disc is sticking out laterally, it is impinging on or touching a nerve root which emanates from the spinal cord posteriorly to the disc and comes through a hole on the side of the vertebral body known as the neural foramen. Because the disc is herniated at the level of C6-C7, it is causing pain down a specific nerve root or dermatome pattern that goes from Paula's neck behind her shoulders down her arm and into her thumb, middle and index fingers. This injury doesn't just affect her neck, but her shoulder, arm and fingers as well. She is not just in horrible pain but has limited use of her right arm and difficulty with the fine motor coordination needed for using her fingers or grasping objects.

It is a good idea to explain all the things your client can no longer do because of her injuries. Do not just focus on her inability to work, but be concerned with her inability to function outside of work as well:

> Obviously, based on these injuries, Paula cannot lift patients any more in a hospital setting. She cannot turn them over. She can neither stand for too long or sit for very long. She even has difficulty placing intravenous lines because she has lost the dexterity needed in her right hand to perform this task. She cannot write nursing notes effectively in the hospital chart for the same reason. Her days of working as a nurse are numbered.
>
> But Paula's inability to work is the smallest part of the case. What is far worse for her, is how her injuries affect her role as a wife and mother. She can no longer engage in relations with her husband. She can no longer lift her children. She cannot shoot baskets with them, skate with them, or throw a ball with them. Even sedentary acitivities like cards, chess and board games are out because Paula can't sit for more than a few minutes at a time. Her life has been dramatically altered and will never, ever, be the same.

Additionally, never finish your opening statement before dealing effectively with the problem areas of your case, especially with the things the defense will try to use to their

advantage. Explain away the weaknesses. For example, describe the reasons your client failed to seek medical treatment right away, demonstrate why a low speed impact caused these injuries, and show how a seatbelt would not have helped prevent her injuries.

Finally, when concluding your opening statement be clear in what you will be asking the jury to do at the end of the case, without asking for a specific number:

> At the end of the case I will have the opportunity to speak to you again during summation. At that time, I will remind you that the defendants caused her herniated cervical disc, they caused her herniated lumbar disc, they caused the pain in her right arm and left leg and that their actions affected not just her neck and back, but her whole life, and I will ask you for a verdict on her behalf. I am going to ask for 100% justice: nothing more; and nothing less.

An opening statement is a key to a victory a trial. Use it as an opportunity to humanize your client, dehumanize the defendants, and outline the relevant anatomy and specific injuries your client suffered. Demonstrate how those injuries have changed you client's life and affected even the lives of her family members. Be careful to deal with the negative aspects of your case and explain them away as effectively as possible. Do not use notes. Look the jury in their eyes, address them directly and impress them with the righteousness of your case.

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***Rhonda Kay****, a member of Gair, Gair, Conason, Steigman & Mackauf, assisted in the preparation of this article.*

# EFFECTIVE OPENING STATEMENTS

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The opening statement is one of the most important components of any trial. Many attorneys believe it is the **MOST** important aspect of the trial; others will acknowledge that it is at least **VERY** important. The reason? It is your first opportunity to present the entire case to the jury. It is also the time that the jury's initial impressions of you and your case are formed. In jurisdictions and/or courts that allow the lawyers to conduct voir dire and personally question the prospective jurors, certain impressions have already commenced. With the opening statement, however, the full details of the case are revealed and initial impressions are hardened.

Most of us are aware of the University of Chicago Law School study, which showed that 80% of jurors decide the case after opening statements.[1] At this point of the trial, the jury is fresh, attentive and eager to hear what the lawyers have to say. By the time of summation, the jurors may be weary, angry at the loss of time and their minds may be cluttered or bewildered. By the time of summation, it is likely that the jury has made up their minds to a great degree--only a monumental effort could change their minds about what they have heard.

[1] Bobb, P.C., *Winning Your Trial in Opening Statement,* ATLA Winter Convention Reference Materials (February, 2001).

## RULES AND STRATEGIES FOR EFFECTIVE OPENINGS

I. ***KNOW YOUR CASE***

A. While this rule may sound like a mere truism, it is the single most important factor that the attorney must adhere to. Well before the trial begins is the time that preparations have taken place. The opening statement is not a time to simply "wing it" and see what happens during the remainder of the trial, or hope that the remainder of the trial turns in your favor.

B. A lawyer is in a superior position to his client, the jury and the judge to know all the details about the case. (We should have all the records, statements, depositions etc. to put everything together).

C. In the opening, the jury expects that they will hear your client's story--and a good one. It should contain a plot, develop all the characters, and do so in a captivating way. You should be able to map out what, when, why and how everything happened, and tell why your client is deserving of a verdict in his/her favor.

D. The details of the case cannot be presented properly to a jury unless you know all that there is to be known. The attorney's biggest enemy at trial is not what you know are weaknesses in your case or what you perceive to be weaknesses--it is being surprised by something that you did not know was coming.

E. Remember, an excellent opening can greatly help in winning the case; a poor opening may be difficult, if not impossible to overcome.

**II. ORGANIZATION**

**A.** The opening should be well organized and delivered in a confident, but not arrogant manner. You want the jury to know that you believe in the case.

**B.** Notes can be used to help you organize, but these should be short points--"high points" or "bullets" only! Do not write out your entire opening statement (the tendency will be to slavishly adhere to what you wrote) and **NEVER, EVER, READ YOUR OPENING STATEMENT TO THE JURY**. Why?

1) You do not want to do anything to distance yourself from the jury; on the contrary, you want them to believe you are one of them.

2) By reading the opening statement, jurors will get the impression you do not know your case, or, the entire case is scripted and false, or, you cannot or will not look them in the eye, or, all of the possibilities just mentioned above.

3) It is important that you establish a rapport with the jury, and that you see their reactions to what is said to them. This is impossible if you are busy looking at papers and reading.

**C.** You may refer to your notes in your opening, but only to keep on track and only briefly. Remember--you already know your case (see # 1 above), so your notes will keep you in the right direction if you wander off or you experience momentary forgetfulness.

**D.** During your organization, you want to give structure your opening statement. While every case, and hence every opening statement is different, the generally accepted approach is as follows:

1) A broad introduction that gets to the heart of the case in just a few moments. It can be a simple statement in length or an entire paragraph. For example:

*This matter involves Joseph Smith, who went into the hospital for a simple test known as a colonoscopy, and ended up paralyzed on the left side of his entire body for the rest of his life.*

or

*On July 12, 2005, a young man, Jimmie Jones, came in contact with an unsafe machine. As you may suspect, the unsafe machine won and Mr. Jones lost. Jimmie lost his arm and almost lost his life. He relied on the strength of his body to earn a living, and now even his ability to work has been taken away from him.*

Do not spend a great deal of time with re-introductions, catering to the jury's "difficult" duty, explaining what you are doing, or getting off the real subject at hand. It is distracting and demeaning to the jury and to your case. Compare the start of the opening statements in the two O.J. Simpson cases (the criminal case for murder and the civil case for wrongful death) from the mid-1990's:

**The Criminal Opening**

*Your Honor, Judge Ito, Mr. Cochran and Mr. Shapiro and Dean Ulman, to my colleagues seated here in front of you and to the real parties in interest in this case, the Brown family, the Goldman family and the Simpson family and to you, ladies and gentlemen of the jury, good morning. I think it's fair to say that I have the toughest job in town today except for the job you have. Your job may be a little bit tougher. It is your job--like my job--we both have a central focus, a single objective, and that objective is justice obviously. It is going to be a long trial and I want you to know how much we appreciate your being on the panel. We appreciate the personal sacrifices you are making by being sequestered. We understand that can be difficult.*

**The Civil Opening**

*On a June evening, the 12th of June, 1994, Nicole Brown Simpson just finished putting her 10 year old daughter,*

*Sydney, and her 6 year old son, Justin, down to bed. She filled her bathtub with water. She lit some candles, began to get ready to take a bath and relax for the evening. Nicole then called the restaurant and asked to speak to a friendly young waiter there. Nicole asked this young waiter if he would be kind enough to drop her mother's glasses off. The young man obliged and said he would drop the glasses off shortly after work, on his way to meet a friend in Marina Del Rey. The young man's name was Ron Goldman. He was 25 years old. With glasses in hand, Ron walked out of the restaurant, walked the few minutes to his apartment nearby to change. He left the restaurant at 9:50 pm.*

The differences are quite astounding. Who would want to remain as a juror in the first case? As a juror, you are being told initially that the case will be long, it will be difficult and you are reminded of your personal sacrifice in being there. The prosecutors opening lacks all confidence (indeed, with the evidence they had, the decision making process should have been easy for the jury).

The civil plaintiff's attorney has created the beginning of a story that makes you want to hear more. Further, he has put life and depth into the dead victims; a jury can relate to their innocent undertakings before they were suddenly killed without warning. In the opening, you want to develop what happened, how it happened, to whom it happened and why it happened.

2) After the introduction, it is time to further develop the parties in your case. It is at this juncture that you give the necessary details to humanize your client and paint the other side in a bad light. Examples would include family, if any, children, spouse, work or profession, and the client's intentions, hopes and expectations for the future. For a civil defense attorney, you would want to portray your client's educational background, years in his/her profession, awards, publications and their honorable lives. A civil plaintiff's attorney **MUST** paint a picture of the client's life before the injuries to

contrast with and explain what life is like after the injuries. This would include how much a spouse and/or children were dependent upon the injured person, the joys of a normal life and how relationships have changed.

3) Once the parties have been developed, and the scene has been set, the details of the claim should be set forth. This would detail out the times, dates and places involved, the actors and non-actors, the place where and the reasons why there is negligence (or breach of contract, or employment discrimination or a felony). This is the body of the opening--the point where you show the jury why your claim, or defense, has merit. It is also the longest part of the opening statement, where the main story unfolds.

Depending upon the type of case, it may be time to define technical terms, medical terms, explain medical procedures or anything that is beyond what we expect is common knowledge to most people. Do not get overly complicated (keep it simple) so the jury will understand. It also gives the jury a preview of what they will hear during the testimony and they will begin to get used to it. You cannot explain why a product is defective unless the jury is given the necessary information; likewise, a jury is not going to understand why a physician departed from good practice, or was in accord with good practice, unless you explain what went on and the technical terms they will hear.

4) As a plaintiff's lawyer, it would logically follow that you would describe the nature and extent of your client's injuries in sufficient detail to let the jury know the seriousness of the hurt as well as the permanent effects upon the plaintiff and their daily life. A full and complete knowledge of the anatomical parts of the body is essential as well as the effects upon the body that these injuries have. While the concept

of pain is important, remember that there is real value in permanent disability and the loss of enjoyment of life. In a wrongful death case, pecuniary damages should be emphasized, including lost income, loss of services, loss of parental guidance and the like.

A defense attorney, in dealing with injuries, has some strategy decisions. Certainly, there are a number of cases where the defense can question whether the injuries are real, or, describe them as minimal to the jury. There should, however, be an imaginary line graph in your mind where it becomes too dangerous to question the injuries or attempt to minimize them. No one would open to the jury and question whether an amputation, or horrendous scars, or confirmed quadriplegia are real or try to convince everyone that they are minimal. The focus then turns on issues that can logically be raised under the circumstances. For example, in a malpractice case, causation may be a hotly contested issue. Do not muddy the defense (and your credibility with the jury) by questioning the injuries along with the issue of causation. If the injuries are obvious you have contest that fact before a jury, why would they suddenly believe your causation defense? In a case of catastrophic injuries or death, it is important to remind the jury that while they may be sympathetic, it must be "put aside" in their decision making for true justice to take place.

5) The conclusion in your opening should clearly convey to the jury what you will be asking them to do at the end of the case. This does not mean that I am suggesting to the plaintiff's attorney you ask for a specific amount. You advise the jury that at the end of the case, after they have heard all the evidence, I will talk to you again about what justice requires for your client.

**III. Restrictions on opening Statements**

A. Neither side is Allowed to discuss the law. The law is the sole province of the judge and neither lawyer is permitted to tell the jury what the law is when it is the judge's sole province to do so.

There is a gray area with this restriction. Even though we are not able to give our version of the law, there are instances where the law is so intertwined with the facts and the claims that some comment is necessary to prepare the jury for what they are going to hear. In a malpractice case, the expert is never asked if they have an opinion whether an act or an omission was "malpractice." They are asked if something was a departure from, or in accord with, good and accepted medical practice. In the opening statement, it can be explained to the jury that certain factual acts or omissions were departures from good practice--and that a departure from good practice is carelessness, it is malpractice.

B. Neither side is allowed to "Argue" their case. This is a rule with little meaning. It is generally known that an opening is what you intend to prove or what the evidence will show. This is supposed to be done without argument. Summations are the "closing arguments." Yet, openings are done every day using argument. How can an opening convey to the jury what they will hear at trial unless some argument takes place? When a plaintiff's lawyer opens and suggests that certain facts show negligence, or malpractice, or a defective product, that is essentially argument. Likewise, the defense is arguing its case when they claim that there is no fault on behalf of anyone. The almost sure way to cure an objection as something being argumentative is to begin the offensive statement

with “We intend to show you....” or “We will prove that.....” or “The evidence will show....” etc.

**IV. Important Points and Suggestions**

A. Never use “legalese” or needlessly employ fancy words and phrases in your opening statement. While in some instances (e.g. in medical malpractice, drug products liability cases) unfamiliar words and phrases must be used and explained to the jury, you still want to connect with the people you are speaking to. The fewer times you have to do that in your opening the better. Remember, you are speaking to people who are a cross section of the community. Some may be highly educated; some may be uneducated. Generally, no one on the jury is very familiar with the legal system, the medical field, or highly technical professions, and they have to understand what you are talking about. Use the language of the people--normal, everyday conversational vocabulary. You are trying to connect with the jury, not distance yourself from them or convey the impression that you are so superior that it is painful to talk to them.

Which sounds better aimed at connecting with the jury?

> *I represent the Executrix of the Estate of James Buckner, who is the decedent in this matter.*

or

> *I represent the widow of James Buckner, who died as a result of terrible injuries...*

Another example of two different ways to approach the same thing:

> *The defendant committed malpractice in failing to undertake a core biopsy of the lesion in plaintiff’s breast, which would have revealed invasive ductal carcinoma, which continued to enlarge and metastasize.*

or

> *The doctor was careless in treating Mrs. Priester. Knowing that there was a lump in her breast, he did not take a sample of the tissue for analysis under a microscope by a specialist. Instead, the cancer was allowed to remain because it was never diagnosed. It continued to grow, spread and invaded other parts of her body. Twelve months later, it was diagnosed by another physician whom she saw. By that time, it was too late.*

:

The answer is obvious to anyone who has tried a case before a jury.

B. Do not minimize yourself as an advocate for your client by doing a non-opening. Lawyers who open by saying nothing specific about their claim or their defense are paving the way to losing the case. This is not advocacy; this is not believing in your case.

As an offshoot of the non-opening, there are many lawyers who like to say to a jury: "What I say is not evidence" and "What my adversary says is not evidence." It is an invitation to the jury to ignore everything you say. I want the jurors to believe everything I tell them. I want the jurors to agree with my claims.

C. Avoid Reservation of Strong Points. The attorney who holds back the details of the case out of fear they will reveal too much to their adversary, sacrifices an important opportunity to reach the minds of the jury at the outset and to create a favorable impression of your case. DO NOT LOSE THIS OPPORTUNITY by being timid. At this early stage of the trial, when jurors' minds are fresh, it is imperative that you seize their thoughts and create a general opinion in your client's favor. An attorney who opens to a jury in only the most general terms will forfeit the chance at gaining favor with the jury or simply does not know the case well enough to go into details.

Do not confuse this principle with a common error made by some attorneys who either exaggerate the claims or defenses, or worse, open to the jury with statements that they cannot possibly prove. You have to deal with the facts of the case, not what you wish the facts would be. The fastest way to hear portions of your opening statement again is to tell the jury you intend to show something and then not do it--your adversary will repeat everything you said in his/her summation. The jury may become skeptical of your entire case.

D. Deal with the weaknesses in your case. This is an important point, but unfortunately misunderstood by many young attorneys. In dealing with the weaknesses in your case, the idea is not to suggest to the jury that there is no merit to the claim, or no real defense. If you do not believe in the merit of your client's position, then you should probably turn the trial over to another attorney.

Weaknesses that must be dealt with are those that are going to come out in the evidence, which may affect the jury's opinion on the issues and must be dealt with. Some examples would be a client's conviction for illegal drugs, perjury or other crime of moral turpitude, a physician's suspension or other sanction for prescribing narcotics to someone who was not his patient, or a failure to wear a seatbelt defense in an automobile case. These should be, and must be, dealt with in opening statements. If you wait until the witnesses take the stand, particularly if you wait until the opposition brings it out on cross examination, the effect is generally devastating because it comes as a surprise to the jury.

Some examples are illustrative:

> *I want you to know the bad as well as the good about this case. My client, in an entirely different matter some years ago, was convicted of the possession and sale of cocaine. It has absolutely nothing to do with this case as you will see. I*

*want you to know about it. I want you to know all there is to know about my client Mr. Samuel. You will consider it for whatever worth it has as to credibility, but judge our case on its merits. My client paid his debt to society when he was convicted of that crime. He served his time and society promised that when he came back he could make a fresh start.*

or

*You will hear during the trial that my client, Mrs. Broderick, was not wearing a seat belt at the time of the accident. The defense will try to use this to show that Mrs. Broderick somehow contributed to her own injuries by not wearing a seatbelt. We will show you that the impact caused by the front of the defendant's car was a side impact—he struck the side of Mrs. Broderick's vehicle right at the door she was sitting next to. We will prove that a seatbelt would not have helped her. The door of her vehicle was crushed right onto her body by defendant's car.*

or

*We will frankly show you that the car my client was driving slid right off the road and into a tree, but we will further show you that no one is to blame. It is just one of those accidents that occur with a motor vehicle when ice suddenly forms on a section of the road at night—something no one can see or anticipate, particularly when the roadway was not slippery up to that point. If the mere fact that a vehicle skidded off the road would mean the difference between winning and losing, we wouldn't be here. We admit that happened. Listen carefully to the judge's charge to you on the law at the end of this case. It is negligence that counts--a failure to be careful. In this case, there was no failure of care on anyone's part, no excessive speed or recklessness. It was just an accident.*

Anticipating weaknesses can bring great rewards, but they must be thought out carefully ahead of time.

E. "Workshop" your opponent's arguments. With the liberal discovery rules now being enforced by the courts, it is rare that a trial attorney will not know what the

arguments of his opponent will be. Long before a trial is commenced, numerous depositions are taken, names and addresses of witnesses are demanded and received, medical records are obtained, accident reports are procured and expert reports are exchanged. These should provide all of the information regarding the main issues in any case.

In a recent case I tried, the wrongful death of a housewife who had some intellectual impairment, she was struck and killed by a truck driver employed by a large company. The defense argument was going to be that she was not crossing in the intersection, but the middle of the street. Further, the driver (and his helper) claimed that they saw the decedent crossing the street, and she got more than halfway across when they saw a young woman with a baby stroller about to cross the street as well in the same direction as the decedent had. The driver blew the horn of his truck at the young woman, when suddenly, the decedent turned around and began to go back to the side of the street she originally came from when she was struck (the inference was that she was confused). The employer's accident report, filled out by the driver, had the wrong street names and a different version of the accident than they were going to tell the jury. The absurdity of what the defense had to say was handled in the opening statement something like this:

> *We do not come before you today having no knowledge of what the parties are going to say in this case. Long before this trial began, pretrial testimony is taken, under oath, where a court reporter takes down everything that is said. The defendant in this case testified as to how the accident happened. You are going to hear that as he approached the intersection of Broad Street and Herkimer Street, he saw Mrs. Horowitz begin to cross the street when he saw her about 150 feet ahead. He continued at the same speed. As he proceeded onward, a young woman pushing a baby carriage was about to cross the street at the same location. He continued forward at the same speed. The driver says*

*more. When he blew his horn, Mrs. Horowitz suddenly turned around, after having crossed almost the entire street and ran back toward the side of the street she originally came from. The driver continued at the same speed until he noticed her right in front of his truck, about 6 feet away. It was only at that point that he applied his brakes. It was too late. We intend to show you that if he were careful, the driver of this large truck would have slowed down and applied his brakes long before he struck Mrs. Horowitz. That if he had been careful, he would have had more than sufficient time and distance to safely stop his truck. Instead, he was careless, continuing at the same speed, when caution, and care, were required.*

The effect was to take away much of defendant's argument before he even began to tell it to the jury.

F. Positioning, emotion and eye contact during opening statement.

1) One of the worst things a lawyer can do is constantly pace back and forth in front of a jury during the opening statement. It is distracting to the jurors and you can lose their interest rapidly. Generally, lawyers who do this also pace with their heads down and rarely look at the jurors at all. Avoid the temptation to fall into this habit; it is hard to break and detrimental to your effectiveness.

This is not to suggest that you should be fixed to one spot during your entire opening statement. That can appear stiff and artificial. I personally hate to have a podium in front of me when I am addressing a jury during opening statement. It creates a barrier between the lawyer and the jury and inhibits freedom of all movement.

Movement during opening statement is preferred, but it has to be restrained and subtle. In order to address all jurors (hence, getting them all involved in your cause) I suggest that you take a beginning position to initially address the jury. Then, after a period of time, move slowly to a different position while speaking and stop

at the second position for awhile. This can be done on a number of occasions during your opening, but make sure it is not overdone or done too quickly or in an unnatural manner.

2) Emotion is a part of any case or defense, but it must be controlled emotion and carefully calculated. The emotion I am referring to is not sobbing because your client has suffered a devastating injury or laughing at a plaintiff who has a minor injury. Emotion is carried and delivered to the jury through your tone of voice, speech patterns, and word usage. The controlled indignation employed by the defense attorney toward the claims or allegations against his client, and that he has to respond to these charges is very effective. For the plaintiff's attorney emotion involves the use of the rise and fall of volume at appropriate points, as well as emphasis when appropriate. No one is interested in a monotone speaker.

3) Eye contact with the jury is extremely important. The trial judge, in his/her charge on the law, will instruct the jury that demeanor is a factor they can consider in evaluating the truth of a witness when testifying. Do you think the jury will follow that instruction for witness but not consider the way an attorney addresses them? The old adage that you can tell if someone is not being forthright or honest if they do not look you in the eye when speaking to you holds true to many people today. You are telling a story and you want the jury to believe you. Show your confidence in your case by looking at them.

This is not to suggest that you want to make anyone feel uncomfortable by staring at them or that you concentrate on one individual juror because they are nodding their head or look attractive to you. In a civil case you need 5 jurors to agree with you; make certain that you address all the jurors and give equal attention to all of

them. Many times you will get signals from a juror at the outset--they do not look at you when you are speaking or they are sitting with arms folded. While this is not 100% foolproof, it may signal a need to work on that juror during the trial in order to convince them of your cause.

4) Know your audience and adjust your style accordingly. While judges and the appellate courts are reluctant to publicly acknowledge the differences in prospective jurors from one venue to the next, any attorney with extensive trial experience will readily admit that there are vast differences in jury makeup from one county to the next.

There are liberal counties and there are conservative counties; the jury pool reflects those general tendencies. In some counties, jurors enjoy and expect an aggressive style from the attorneys (little guy versus the rich establishment). In other counties, jurors expect a low key approach that they equate with common courtesy and good manners. A lawyer must take these factors into consideration and adjust his/her approach to the jury. This does not mean you must change the content of your opening, but how you deliver it is something to take into consideration. A “fire and brimstone” approach may work on a jury in one county, but in another county the jury may view it as an ill-mannered lawyer who is out of control. Your conviction as to the righteousness of your position will be the same; your style must be adjusted to fit the audience.

5) Resist using hyperbole in your opening. Since attorneys are employed to speak as an advocate, and we are involved in telling a story during openings, the common tendency is to exaggerate in order to make the case better. It is like the old fisherman’s story about the one that got away. What starts out as a 1 ½ lb. bass that got

away, days later turns into a story that Moby Dick was on the fisherman's hook -- in a freshwater lake!!

Do not exaggerate your claims or your defenses. It will come back to haunt you during summation. Never undersell your case either. The point that must be made is that you are not going to turn a simple broken leg into hemiplegia. Jurors see through the nonsense and punish the offender.

**V. The Law as it relates to Opening Statements.**

A. An attorney's failure to state every item necessary to establish a prima facie case in his prima facie case should not, ipso facto, be deemed fatal. It was improvident of the trial court to dismiss plaintiff's case at the close of their opening statement. *Stines v Hertz Corp.*, 45 AD2d 751, 356 NYS2d 649 (2nd Dept. 1974). It is well settled that dismissals at this juncture are not favored. *O'Leary v American Airlines,* 100 AD2d 959, 475 NYS2d 285 (2nd Dept. 1984). It should be granted only when it clearly appears that (1) the complaint does not state a cause of action; (2) the cause of action is conclusively defeated by an admitted defense, or (3) counsel by admissions or statements of fact has subverted his cause of action.

B. When entertaining a motion to dismiss following opening, the court should explore the viability of the case by consulting pleadings and bill of particulars, to determine whether there is enough to warrant eventual submission to the jury. *DeVito v Katsch,* 157 AD2d 413, 556 NYS2d 649 (2nd Dept. 1990); (see also *Becker v David Askin, Jr. Inc.,* 36 AD2d 520, 317 NYS2d 720; *Black v Judelsohn*, 251 App. Div. 559, 560, 296 NYS 860).

# COURTROOM PERSUASION

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## I. The Persuasion Process

A. Trials involve complex issues requiring jurors to make informed decisions of great importance.

B. Courtroom persuasion is communication intended to induce a belief that your case has merit and then move the jury to find in your favor.

C. Aristotle's Discourse on Rhetoric, written over 2300 years ago, reduced principles of persuasion to four major points:

1. Well dispose your audience to you and ill disposed to your adversary
2. Maximize your salient points and minimize your weaknesses
3. Refresh the memory of your audience frequently
4. Execute the required level of emotion

D. Courtroom persuasion has four major goals:

1. Inspire
2. Influence
3. Instruct
4. Empower

E. Law schools rarely teach, and few trial lawyers have studied, techniques of argument, debate, rhetoric or persuasion.

F. This lecture will discuss persuasion techniques for the trial lawyer.

G. The focus will be on developing a "persuasion theory", as distinct from a legal and case theory.

H. There are many disciplines, other than the law, which we, as trial lawyers, can look to for guidance:

1. The Behavior Sciences, which involve social-psychological experimentation in such areas as decision making, group decision making dynamics and bias.

2. Market research and Madison Avenue, which investigate what motivates people to buy a product.

3. Script writing for cinema, with its emphasis on "showing, not telling", has valuable insights into what captures the imagination of an audience. (See, "Story" by Robert McKee)

4. Books on creative writing techniques discussing the use of action verbs and concrete nouns instead of exposition can help us when we give an opening statement. See, "Stein on Writing" by Sol Stein.

5. Even the computer sciences can help us as trial lawyers become better persuaders. See, "The Lawyers Guide To Creating Persuasive Computer Presentations" by Ann E. Brenden and John D. Goodhue, and "Beyond Bullet Points" by Cliff Atkinson.

## II. **Schemas, or How People Perceive**

A. People organize their beliefs, expectations, and knowledge in units know as "schemas".

B. When people encounter a new experience, the schema is the cognitive framework for understanding and making sense out of the experience.

1. A jurors' prior experiences influences their perception of the trial evidence.

2. Schemas influence perception, and serve as a framework for interpreting evidence at trial.

3. Schemas also influence the information "remembered" during deliberations.

4. These decision making strategies create shortcuts, influence how people react to new information and how people make decisions.

5. If a trial lawyer understands these schemas, through focus groups, common sense or other means, and presents the case so that the evidence is consistent with these schemas, there is a greater likelihood of success.

C. Steve Covey, author of "Seven Habits of Highly Effective People", states that most people view facts within a specific framework.

1. Trying to convince someone that the framework is fundamentally misguided is futile.

2. You can take a horse to water, but you cannot make it drink.

D. If jurors expect a party to behave in a certain manner (norm bias) and if that party violates those expectations, jurors will probably feel the party has acted improperly, regardless of what the law says.

E. Various forms of biases, such as "fundamental attribution error",

"confirmation bias", "anti-plaintiff bias", "belief perseverance bias" are so fundamental that most jurors are not even aware how much it affects their judgments.

F. Studies have shown that jurors also care about motive, even if the law does not require it.

1. Motive is one of the key factors that people have in the scripts they use to test whether they are going to believe what they hear
2. Just like credibility, it is always essential
3. Lawyers think they have to prove what happened, but why it happened is frequently necessary to persuade.

G. Jurors do not decide cases based upon reality, but their perceptions of reality.

H. Six broad based sources affecting jurors' perceptions and how they decide:

1. Beliefs before entering courtroom (pre-load)
2. Everything observed during trial
3. Evidence presented and credibility of the witnesses
4. Persuasion by counsel
5. Court's charge
6. Persuasion by other jurors

## III. **Jurors of 21st Century**

A. Jurors do not think or reason the way trial lawyers do – Jurors are not lawyers:

1. Lawyers are taught to reason inductively, to present the evidence in their cases one fact at a time, ultimately hoping to persuade a jury by logic and reason.

2. Jurors, on the other hand, frequently think more deductively, seeing the big picture, and fitting the small pieces of evidence into their frame of reference.

B. Jurors make decisions based on their life's experiences that may, and usually do, vary from legal theories of responsibility.

1. Jurors think things are important that lawyers do not; things that trial lawyers worry about, frequently are unimportant to jurors.

2. Any trial lawyer who has de-briefed a jury following a trial begins to appreciate these differences when discussing what was important to the final jury verdict.

C. Knowing all of this, many trial lawyers continue to try their cases in the same by-gone manner of yesteryears.

D. Trial lawyers began noticing in the early 1990s that they were starting to lose cases that they should not have.

1. Questions asked by jurors in voir dire began to change.

2. Juror's reactions to the evidence had a different spin.

E. Jurors now walk into the jury room with more knowledge than ever before:

1. At any given time there are legal programs on television with large viewing audiences.

2. There is not a person in America who did not witness at least part of

the O.J. Simpson case.

3. No juror thinks the McDonald's case has any merit.

   a. Many jurors believe the plaintiff was awarded upwards to 30 million dollars.

   b. Jurors do not know that there were over 700 prior reported incidences of people being hurt by excessively hot coffee.

   c. The media did not report about the internal McDonald memos that placed profit over customer safety.

4. Over the past several years, the volume of advertisements, media attention, legislative lobbying and general efforts (including President Bush) to influence the American public regarding our civil justice system has increased tremendously.

5. Every potential juror has already been tampered with before entering the selection room.

F. This bias must be addressed in your case, or suffer the consequences.

G. Learn, or remember, the language of the people:

1. Many cases involve complex language, such as technical, scientific or medical terms

2. Learn in advance which terms will be received by the jury and remembered

3. Remember, it is not enough that a jury understands what you are saying, they must be able to remember it during the course of the trial and use it during deliberations.

IV. **Lawyers By Training: Old Habits Die Hard**

A. Law schools teach the law, but nothing about jurors, how they think, and what makes them decide cases the way they do.

B. From the time we start law school and begin learning to think and talk like lawyers, the process of differentiation begins.

1. Legal training involves a way of thinking that in many respects is different than the audience that we try our cases in front of.

2. The longer we remain lawyers, the more lawyer like we become surrounding ourselves with friends who are lawyers, and immersing ourselves in lawyer-like activities on a daily basis.

a. It is not surprising that we have difficulties relating to juries.

3. We are drilled on being objective, and all are taught to separate ourselves from emotions and non-rational elements.

4. Jurors, on the other hand, make decisions by emotions and then sift through the evidence in order to validate their emotional response with logic.

C. Lawyers become masters of minutia.

1. When trying cases, most lawyers present many more facts to the jury than they should, mostly out of a fear of leaving something out that a juror may think is important.

2. In reality, bombarding jurors with so many facts, many of which do not support the theory of the case, simply dilutes the message and defeats

the purpose.

D. Law schools teach a language that no one other than lawyers can understand.

1. Much of legal education is spent on vocabulary training that actually gets in the way of effective communication.

2. Just look at the typical jury instruction, filled with language frequently incomprehensible even to the well-traveled attorney, delivered in rapid fire sequence, with virtually no attempt to make the instructions comprehensible to the people charged with applying it to the facts of the case.

3. Judges are afraid of being reversed if they use anything other than traditional legal language.

4. In our training, we are taught that the person with the best evidence and the most logic on his side will win.

## V. Trials Ain't Law School

A. Trials involve more than a battle of logic and competing legal theories.

1. In fact, impressions are probably more important.

2. Remember, jurors make decisions based upon their "perception" of the facts rather than the facts.

3. Once having formed an impression, it is difficult to change it.

4. Jurors tend to look for ways to ratify their perceptions, rather than keeping an open mind.

5. Being a trial lawyer means to learn to think like a real person again and anticipate the questions that will be important for the jury to make a decision.

B. Lawyer perspective versus juror perspective

1. Lawyers focus on case development, legal issues, and often ignore common experience.

2. Many trial lawyers feel that jurors are objects to be fooled and manipulated, and that trials are a game.

C. Lawyers think that they can bring jurors over to their way of thinking, rather than learning how to craft their case to the juror's way of seeing things.

1. Trial attorneys rarely attempt to put themselves into the shoes of jurors.

2. To be effective with today's jurors, the trial story must be crafted in such a way so that it conforms with the common experiences of the jury.

D. Oliver Wendell Holmes once said, "The life of the law has not been logic; it has been experience."

1. We must therefore factor in the "jurors' experience" when making choices about how we try our cases.

## VI. **Story Telling**

A. The story is how real people process facts, and is critical for courtroom persuasion.

B. The story is what makes ideas stick.

C. Storytelling is the function of the trial lawyer and the conduct of a trial.

1. The trial itself is the telling of the story from several vantage points.

D. The oral tradition of story telling is as old as mankind.

1. From the early cave drawings at Lascaux, France, which told the story of the hunt with pictures, to the early writings of Homer, stories have been the primary means of communicating information.

2. These early stories, which had a well-defined beginning, ending, conflict and resolution, are remembered throughout time.

E. Some of the earliest attorneys at the English Bar were referred to as *Narratores* or *Conterus (Fr.). (*Commentaries on the Laws of England, Blackstone, by Cooley and Andres, Vol.II 1899, pgs/26,217.)

F. The story that fits the facts best within the widest range of value-beliefs will frequently carry the day in court.

G. Current research has discovered that jurors do not usually make up their minds about the case during opening statements, but they do begin to develop a *trial story*, which once developed, becomes the framework for incorporating everything else which follows.

1. There is some compelling empirical evidence to support the theory that, once a juror has adopted a trial story, they tend to cling to it even in the face of conflicting evidence.

H. This same theory, frequently seen in focus groups, suggests that information presented early in a case has an inordinate influence on how the evidence is construed.

1. This supports the notion that it is dangerous to withhold strong evidence to the end of your case thinking that it will have more effect. If it is that good, get it out early.

I. Cicero's forth maxim of persuasion: "*Faci Dicionis Rei Audientes"–" draw the audience into the story"* is as true now as when it was written. Cicero's other persuasion maxims were:

1. Reach the mind and move the heart

*2.* Motives are the key to human behavior

3. Move from particulars to universals

4. Show the fallacy in argument of your opponent

5. Communicate passion and logic in the language of the audience

J. Tell the story in present tense, using active verbs, and very few adverbs and adjectives, much in the tradition of Hemingway; this is the best way to tell a trial story.

K. Working out a simple story line is not always easy.

L. Lawyers tend to use needless details (Lawyers are trained in minutiae), but are to leave anything out for fear that the jury might think that it is "the important fact."

M. Where to begin the story

1. Multi-tracking

2. Saving Private Ryan: begins in the graveyard

3. Titanic story:

   a. Boy pushing broom

   b. White Star boardroom

   c. Need to do away with life boats to make room for more luxury suites

4. Look at from three view points

N. Storyboards

1. Create a storyboard, similar to the ones used in animation or movies.

2. Begin with the facts, placing them in chronological order.

3. Come up with two or three themes, or telegram descriptions.

4. Decide on the proper temporal perspective: yesterday, today (now) or tomorrow ( what the future holds).

5. The storyboard can be simply a written outline which serves as the structure for the story.

6. “Show” don’t “Tell”— action is critical to a good story.

## VII. **Rhetorical Devices**

A. There are many rhetorical devices which can be incorporated into opening statements and summations, such as:

B. Analogies, metaphors and similes

C. Embedded commands

D. Identification with universal themes and cultural heros

E. Mnemonics

1. “POP” (Predictable, obvious, and preventable)

F. The “Rule of Three”

1. Three of a kind concepts
2. Nouns and verbs with three adjectives are adverbs
3. “I came, I saw, I conquered”
4. Father, Son and the Holly Ghost
5. Life, liberty and happiness

G. Sayings, maxims and Proverbs

1. “Asleep at the helm”
2. “A banker gives you an umbrella when the sun is shining and takes it away when it begins to rain”

H. Rhyme and alliteration: “ If the glove does not fit you must acquit”

I. Rhetorical questions:

1. Patrick Henry’s speech of 1775: “Are fleets and armies necessary to a work of love and reconciliation? These are the implements of war and subjugation...”
2. What does it mean to have to eat like a dog? (Moe Levine’s summation in a quadriplegic case)

VIII. **Themes**

A. A theme is a sound bite that summarizes your view of the case.

B. Themes are natural part of our human experience.

C. The sources of themes are endless, and have been used in every form of communication, from ministers, artists, authors, musicians, politicians, advertising and in everyday conversation.

D. Themes drive human thinking.

E. From Perry Mason (“The Case of the Restless Redhead”) to the countless billboard messages designed to sell a product with a few words and a single image, themes are everywhere.

F. In litigation, the best themes appeal to jurors’ sense of fairness, common sense, and experience.

G. Themes need to be short, simple and the easy to remember.

H. Trial themes relate to all phases of the case, including arguments on damages, the conduct of people and corporations, and empowering the jury.

I. Well-tested themes can be adapted for courtroom use, such as:

1. “Life, Liberty and the Pursuit of Happiness” on damage issues.
2. “An ounce of prevention is worth a pound of cure”
3. “No fury like a woman scorned”
4. “Actions speak louder than words”
5. “He who pays the piper calls the tune” (for overpaid experts)
6. “ Safety first–not last”

J. Every case should have a folder or a file on the computer where ideas concerning themes can be put.

1. Started at the time the case is opened

2. Whenever something occurs to you, put it in the folder

K. Good themes live within your files

1. Frequently the best themes come from the first interview with the client.

2. Learn to keep your ears open for themes during the lifetime of the case.

L. All cases need themes, and most have sub-themes

1. Factual themes

2. Legal themes

3. Liability themes

4. Damage themes

M. Focus groups are invaluable sources for good trial themes

1. Focus groups can be used to find, test and refine themes before trial

2. A good theme enables jurors to look for evidence that fits the trial story, becoming a filter through which all evidence must travel.

N. Bring your story over to them, rather than asking them to come over to you.

O. Standard Themes

1. Profit over safety

2. POP

a. **commit**

**b. commingle**

**c. communicate**

P. Ten word telegrams

1. How would you write a 30-second commercial?

2. Lawyers generally come up with too many facts and too many theories.

3. The 30-second test – tell someone about the case in 30 seconds.

4. How would the clerk of the part describe the case: “This is a case about a young kid who ran across the street without looking.”

5. Telegram: White Star chooses luxury suites over lifeboats. 1400 drown. Accountable

   a. Themes from telegram

      (1) accountable

      (2) profit over safety

      (3) Defendant’s choices

6. Last part of telegram is what do you want the jury to do

Q. Metaphors as themes

R. Themes are not about facts, but perceptions

S. Themes serve as the moral foundation of the case.

T. Themes on damages

1. Needless

2. Senseless

3. Endless( consequences never end)

## IX. **Opening Statements - What To Include And What To Omit**

A. The goal of every trial lawyer is to make his opening statement so powerful

that the other side can never recover.

1. To do this, it is fundamental to know the audience and how they think

2. Juries today are much different than those of days past.

3. The time you have the jurors' greatest attention is at the beginning of your opening statement

B. Credibility of the persuader is critical: if they don't believe you, they certainly will not believe your message.

1. Building trust with the jury is critical: trust me, trust what I am saying to you is true.

2. Jurors are naturally suspicious of trial lawyers; surveys consistently find that most jurors believe that trial lawyers will lie in order to win their case.

C. As a result, when beginning your opening statement, it is likely that a jury will not embrace a bold adversarial statement, such as this is a case about a doctor who did not care about the well being of his patient, or this is a case about corporate greed.

1. Words must be carefully chosen, since meanings may vary depending on perspective.

2. It is risky to begin openings by calling the defendant negligent or your client a victim, before the jury has heard anything about the case.

3. The jury may very well think that the victim is the person being sued by the greedy plaintiff.

D. Jurors rely less on decisions based upon authority (believe me because I tell

you to) and require arguments which appeal to their sense of reason. The role as teacher, rather than advocate or preacher, fits better with modern day jurors.

E. Proper structure is critical

1. Subjects are layered one at a time in a managed sequence

2. Do not mix topics

3. Stream of consciousness openings are ineffective

4. Do not begin as an advocate.

F. When possible, attempt to show that what the defendant should have done would have easily avoided the harm

G. No wasted beginnings, such as openings are like a map.

1. If you squander your time on cliched explanations of opening statement (roadmap, what I say is not evidence, etc.), you have lost a missed opportunity.

H. The jury wants to arrive at conclusions on its own: your job is to lead them there, but let them get to the correct answer on their own.

1. Proper structure is the key.

2. Give the jury the rules, the facts and let them arrive at the conclusion.

I. Ask and <u>answer</u> the jurors' questions.

1. Every case has problems and difficult issues.

2. Try to answer them in opening

3. If you wait until they come up at trial, you will be unable to explain them in the way you want to.

4. This usually is in the middle of the opening

J. Do not make bold statements about the *responsibility* in the beginning of your opening

1. You do not have credibility with the jury yet.
2. It is much better setting out factual matter, and letting the jury decide the ultimate issue.

K. Tell the story first and only then offer reasons why they should find in your client's favor.

L. Too many lawyers think that their theory of the case is that a company is negligent, or a product is defective.

1. A proper theory tells the jury *why* the case should be decided in your favor, such as:
2. After 25 burglaries and 10 robberies at this large hotel, the management still only spent 2 cents of every dollar on security.
3. The product was defective because seven other children suffered serious burns wearing the same pajamas.

M. Rule and consequence – The Beginning

1. Do not start with unsupported assertions or conclusions
2. Start with the rules: most people, beginning a new experience, such as being a juror, want to know the rules to play by first before hearing about the case.
3. Rules are concrete and understandable, and bring meaning to abstract concepts, such as the *reasonable man , reasonably prudent,* or

*unreasonably safe.*

a. *Reasonable*, while having a number of meanings, in the context of litigation means: conforming with established standards or rules.

b. Confusion, ambiguity and complexity usually result in the jury concluding that the plaintiff has not met his burden of proof(ambiguous liability standards strongly favor the defense)

c. In simple car crash cases, most jurors know what the rules of the road are; the problem comes more with complex cases unfamiliar to most jurors.

4. The trial lawyer must *define the Rules* for the jury.

5. Use non-legal words: remember, the goal is to communicate to the fact finders.

6. Do not state that the rule was broken, merely state the rule

7. As you tell the story of the case later, the jury will probably spot the rule breaking

8. For instance:

a. A driver must keep his eyes on the road. If he does not, and runs into another car, the law holds him responsible if someone is injured.

b. A doctor who is diagnosing a patients symptoms has a duty to rule out the most dangerous potential diseases before discharging the patient.

9. Identifying the *RULES*

a. The rules need to be reduced to a list of outcome determining in the case and difficult for right thinking people to dispute.

b. Most fields, such as medicine, engineering, insurance, have customs, standards, rules, statutes.

c. Jury instructions, on occasion, define clear rules of conduct.

d. Common sense, like: safety of the passenger is always important when driving a bus, or a surgeon should not cut any structure without first knowing what it is he is cutting.

e. It is always best to question adversary witnesses at the deposition about the *Rules* so that there is no room at trial to move off of the point.

f. Rules must be:

(1) easy for the jury to understand

(2) indisputable by the defense

(3) violated by the defendant

10. The entire trial now becomes a focus shift away from the *reasonable standard* to one of whether the defendant violated a specific rule.

11. For a good discussion on this topic, see: *Rules of the Road* by Rick Friedman and Patrick Malone

N. The story (what the defendant did)

1. Now let me tell you what happened in this case

2. Jurors will listen to see if the rule was broken

3. Again, use words that do not imply blame, which will come after the story.

4. Avoid adjectives and adverbs

5. Merely state the facts, omitting your opinions and conclusions

6. For instance, in a medical malpractice case, do not look at the disease or consequences of the disease; focus first on the doctor and the *choices* he made

7. Focus on the conduct of the defendant as much as possible, keeping the blame where you want it to be.

    a. not how the patient went to the doctor after finding a lump

    b. look to doctor's conduct

    c. focus on doctor's choices

        (1) Instead of starting with the plaintiff finding a lump in her breast, instead:

        (2) Dr. Thompson examines the breast of his patient who has just found a lump.

8. Always attempt to show the defendants' *motivation*, even though you do not need to prove it in order to make a case

9. Use short sentences

10. Present tense is always preferred (help the jury relive the experience)

11. One action per sentence (avoid endless sequences of facts and descriptions devoid of action )

12. When possible, focus on what can be seen, heard, felt or smelled.

13. Conclude with the harm caused, but keep it brief at this point, since damages will be covered in more detail later.

O. Who is being sued and why (after the story)

1. Explain who is being sued

2. By this point, the jury knows what the rule is, what the defendant did, and the harm that resulted

3. We are suing Dr. Thompson for four reasons:

4. The first reason we are suing Dr. Thompson is that he chose to ignore the possibility of breast cancer

5. Characterize omissions as affirmative acts, such as the defendant made a choice not to consider the possibility of cancer.

6. Explain how it is *known* what the defendants did, either from the records or testimony.

7. Explain in principle *what is wrong* with doing what was done, without being specific to this case, and why such is so.

8. Explain how the wrongdoing harmed the plaintiff

9. What *should* the defendant have done

10. What *good* would it have done if the defendant had done what you say he should have done.

11. When possible, show how *simple* it would have been to do what you claim, such as ordering a mammogram or ordering a test.

12. Then state [each reason] why you were suing the defendant, using the same method as outlined above.

P. Undermining the defense

1. Always confront the defenses before the defendant has an opportunity to do so.
2. Take the initiative to demonstrate that you considered the other sides contentions before bringing the lawsuit.
3. Explain that this was done before the lawsuit was commenced.
4. Undermine all of the defendants contentions, not just selective ones
5. Explain how you consulted with an expert or investigated, because if there was not a good answer for a particular question, the case would not have been brought.
6. Anticipate the questions that jurors, not lawyers, want answered.

Q. Damages

1. Once you get to damages, do not go back to issues of liability.
2. One of the questions the judge will give to you to deliberate on is how much money it will take to make up for the harm that was done to the plaintiff.
3. It will be necessary for you to hear about the injuries in this case and how it has affected the plaintiff to make your decision
4. Discuss the actual damage, the mechanism and extent of the injuries
   a. Avoid technical language by using plain language
5. The consequences brought about by the injury, focusing on the

physical disabilities rather than the impact on the plaintiff's life

6. The"pain and suffering" associated with the injury, being as specific as possible.

   a. Use analogies that people can understand

   b. Separate physical from mental and emotional suffering, and why it is real

7. How it has affected the activities of daily living, focusing on human consequences

8. Income and job loss

9. What can be done to make up for the injury

   a. Undermine defense contentions

   b. Do not ignore prior conditions

      (1) Use a simple double column chart with prior problems and new problems, and explain that you are not seeking money for anything that is in the left column.

R. Mechanics

1. Attempt to deliver your opening in 45 minutes or less

2. Avoid unnecessary movement

3. Plant your feet , pick out one or two jurors and deliver a sentence.

4. If you need to move, do so, and then start talking again.

5. Use an outline

   a. I prefer to write, or type, my entire opening out, word for word at first.

b. Then reduce to an outline

S. Visuals

1. Visuals enhance the message.

2. Lawyers are far behind the rest of society in understanding the importance of presenting information visually.

3. It is very hard to hold the attention of the jury for long without the use of something to look at.

4. Put even the simplest of exhibits up, and watch the jurors move forward in their seats.

5. Visuals can be either (real evidence, such as blow ups of the hospital chart, or demonstrative) such as a blow up of the anatomy.

6. Additionally, spoken words can be reduced to writing, either on a blackboard or by way of PowerPoint.

7. Use is totally discretionary with the trial court, so you need to know before you stand up if the judge permits it.

8. If exhibits, such as the hospital chart, are pre-marked before openings, using blowups during openings.

T. Where the documents are voluminous or difficult to comprehend, the court has discretion to permit the use of *schedules or summaries* which are based on the facts in evidence.

1. The exhibit must be fair and accurately convey the data, the underlying data must be voluminous and otherwise admissible, and the data must have been made available for examination by opposing counsel. See,

Herbert H. Post & Co. v. Sidney Bitterman, 219 A.D.2d 214, 227 (1st Dept. 1996).

X. **Working With Witnesses to Increase Their Jury Appeal**

A. Use other witnesses to provide testimony about the harm is done to the client, rather than the plaintiff

B. Answer the questions that the jury wants to hear

C. Try to have witnesses avoid using conclusions, rather than specific, anecdotal stories .

1. Ask follow-up questions of the witness when they make general statements, such as Ms. Jones has not been herself since her diagnosis.

D. Have witnesses use tangible objects, such as crutches, leg braces to explain situations, rather than merely describing them in words

E. When working with experts, use the word conclusion rather than asking him what his opinion is

F. When asking the doctor whether his conclusion is based on a reasonable degree of medical certainty, follow-up with him/her by asking if, by a reasonable degree of certainty, you mean certainty based on reason

G. Then follow-up by asking how certain that doctor is with his conclusion.

H. When working with your expert, make certain that he/she knows that their conclusions are not enough, but that it is essential to teach the jury to come

to the their own conclusions.

I. Have the expert discuss significant issues in the case in a general way, such as what is a differential diagnosis and under what circumstances is his method utilized by the medical profession.

1. Once this is done, then show how this method is applied to the facts of this case, and how it leads to his ultimate conclusion.

J. If you are using a theme, such as, POP, ask the expert: Was it preventable? Was it obvious? Was it predictable?

K. Time-unit theories of argument utilizing units of time for pain and suffering, and assigning a specific dollar amount, which is and multiplies at this rate over time, are impermissible. Halftown v. Triple D Leasing Corp., 89 A.D.2d 794 (4th Dept.1982)

## XI. **Keys to a Powerful Closing**

A. Summations rarely change minds, but they can help jurors who are favorable to your case persuade others during deliberations who are otherwise undecided.

B. Explain to the jurors that one of their jobs during deliberations is to explain to the other jurors why you feel the way that you do; I will give you some tools to use as you discuss this case to reach what is a just verdict in this case

C. Use simple phrases that are easy for jurors to remember.

D. Try not to repeat the entire case; the jurors have heard the evidence.

1. If you start repeating that which they have spent so much time listening

to, there is a big risk that the jurors will stop listening.

E. If possible, put tabs on portions of the hospital records or other exhibits that support your position.

F. The structure for the closing is very similar to that which was used during the opening statements.

1. Why you were suing Dr. Thompson

a. Briefly summarize what he did wrong

b. Briefly summarize what he should have done

c. Briefly summarize what good that would have done

2. Undermine the defense

a. If someone brings up during deliberations that Dr. Thompson was doing the best that he could, remind them that he was still required to consider cancer and then rule it out.

b. All of the doctors on both sides of this case have testified that once something is on the differential list, the doctor is not permitted to ignore it until he has ruled it out.

c. Do this for each of the major issues in the case, including causation

G. Review each of the questions that the jury must answer in the case

1. Explain how the evidence coincides with the jury questionnaire.

2. Review the damages

3. Have a blowup of the Jury Questionnaire, and go through it carefully

H. Explaining the jury instructions

1. Jurors do not understand the charge, many studies have shown this.
2. Important instructions must be reviewed with the jury
3. Go over the jury questions, using PowerPoint, or if you have the time, a blowup of the questions.
4. Review each instruction in each question, one by one, explaining what it means and how the evidence applies to the question and the jury instructions.

I. Admitting some fault: the defendant knew all about the possible consequences. Mrs. Jones did not even know 5% as much.

J. Ask rhetorical questions, such as how did not performing a mammogram help Mrs. Jones ?

XII. **Persuasion in the Visual Age**

A. Trials involve complex issues requiring jurors to make informed decisions.

B. Integrated presentations, using both the spoken word and visuals to communicate information, engage the jurors and keep them interested throughout the trial.

C. The Audience

1. Jurors live in a media-saturated culture, constantly exposed to visuals and verbal messages from television, theaters, videos and computers.
2. Most jurors are visual learners
3. Jurors learn and retain more information when multiple senses are addressed.

D. Visual Strategies

1. The key to persuasion is presenting a message that is understandable and rememberable to the audience.

2. Technology and behavior science give trial lawyers more tools for effective persuasion.

3. Demonstrative evidence has moved beyond merely passing around photographs to the jury.

4. Effective visual strategies begin when the case is accepted.

5. In the first Vioxx case to go to trial, Mark Lanier used 253 pictures during his PowerPoint presentation. Ernst v Merck & Co. (Tex., Brazoria County Dist Ct, Aug 19, 2005)

6. Many trial attorneys are still reluctant to utilize commonly available technology and incorporate it into their trial strategy.

7. Many attorneys still feel uncomfortable integrating effective visual material with their verbal presentations.

E. There are certainly disadvantages to not using available technology, and no trial attorney wants to be upstaged in the courtroom by an adversary who presents a well-orchestrated case utilizing available technology.

F. Visual strategies can help make complicated ideas easier for jurors to understand.

G. The goal of an effective visual strategy is to help jurors remember information and apply it to decision making

H. Many cases involve abstract concepts, complicated ideas and difficult medical

conditions. Good visuals can help jurors understand this information much easier.

## XIII. The Concept of Fair Comment (A Little Ethics thrown in for Credit)

A. DR 7 106 [1200.37] Trial Conduct: In appearing as a lawyer before a tribunal, a lawyer shall not:

1. State or allude to any matter that he or she has a reasonable basis to believe is relevant to the case or that will not be supported by admissible evidence.
    a. See, Cohn v. Meyers, 125 A.D.2d 524 (2nd Dept. 1986)and Humiston v. Rochester Institute of Technology, 195 A.D.2d 961 (4th Dept. 1993)
2. Ask any question that he or she has no reasonable basis to believe is relevant to the case and that is intended to degrade a witness or other person.
    a. See, Arnou v. Craig, 184 A.D.2d 1048 (4th Dept. 1992)
    b. See, Taggart v. Alexanders Inc., 90 A.D.2d 542 (2nd Dept.1992)
3. Assert personal knowledge of the facts in issue, except when testifying as a witness.
    a. See, Rodriguez v. New York city Housing Authority, 209 A.D.2d 260 (1st Dept. 1994)
4. Engage in undignified or discourteous conduct which is degrading to a tribunal.

a. Counsel may not personally attack opposing counsel, party or witnesses. See, Steidel v. County of Nassau , 182 A.D.2d 809 (2nd Dept. 1992)

B. Settlement negotiations may not be mentioned. Sabin-Goldberg v. Horn, 179 A.D.2d 462 (1st Dept. 1992)

C. Counsel may not refer to matters not in evidence, indulge in arguments not founded on the proof, or appeal to prejudice or passion. Cattano v. Metropolitan St. Ry. Co., 173 N.Y. 565 (1903)

D. Although it is permissible to comment on the failure of an adverse to call a witness who is under the parties' control and whose testimony the party could be could be expected to produce if it were favorable to the party, counsel may not refer to the failure of an adverse party to call a witness whose testimony is irrelevant. See, Godfrey v. Dunn, 190 A.D.2d 896 (3rd Dept. 1993)

E. Appeals to passion, prejudice or sympathy generally are not permitted. See, Doyle v. Steifer, 34 A.D.2d 183 (3rd Dept. 1970)and Serpe v. Rappaport, 103 A.D.2d 771 (2nd Dept. 1984)