



Opening statement and the invisible injury

Getting the jury to see invisible injuries, including pain, depends on the emotional congruence with which you present them

BY JOHN F. DENOVE

All injuries are invisible to jurors who don't care. As attorneys, we become upset when jurors ignore the evidence and our arguments and turn the plaintiff away with less than he deserves. Rather than blame the jurors for their lack of intelligence, or worse, their insensitivity, perhaps it's more productive to examine why we were unable to motivate them. The following looks at ways we can construct and present a better opening statement, not only for the invisible injury, but all injuries.

What is an invisible injury? It is an injury that we cannot see. Invisible injuries comprise most of our cases. CACI 3905A states that non-economic damages are physical pain, mental suffering, loss of enjoyment of life, disfigurement, inconvenience, grief, anxiety, humiliation and emotional distress. Except for disfigurement, all of these injuries are invisible. To make the jurors see these injuries you must make them come alive. But how?

Opening statement is a story

Successful trial attorneys agree that the key to persuading a juror to do what he or she should do is to tell the juror a story. Opening statement is a story. The better story you have, the better chance you have to win. The better storyteller you are, the more your story will be believed and remembered.

There are five elements of a story. They are theme, structure, content, expression and delivery. The theme is a unifying or dominant idea. A good theme is the primary mental organizer that enables jurors to look for evidence that fits the story and to disregard evidence that does not. The theme is a story about what the story is. "Her pain works 24/7." "His pain never sleeps." The theme must be

simple, easy to remember and supported by the evidence.

The structure is the order, or arrangement of the parts of the story. The trial isn't about the plaintiff and her suffering. It is about how defendant's bad conduct caused the plaintiff's suffering. Begin the story with what the defendant did.

Content is the information you want the jury to hear and see. The case is about what you tell the jury it is. Select the key facts and events that move the story along. Don't clutter the story with needless detail. The details won't be remembered. Unnecessary detail will only dilute the information you want the jury to focus on.

Drop the fancy terms - the "eses"

The expression is made up of the words you choose to convey ideas, emotion and feeling. Choose your words carefully. Use words that are easy to understand. Drop the legalese, legalese and all other "eses." Use the same words throughout the opening and the trial. If you call it a herniated disc, don't later call it a disc protrusion or a ruptured disc. Repetition is important. Studies have shown that words that are presented more frequently are rated as more favorable than words that are used only once or twice. Familiarity breeds liking. In addition to consistency, use embedded questions, comments and commands. "You'll be curious to learn how she attempts to deal with her suffering." "If surgery doesn't take the pain away, will she be in pain forever?" "Can you imagine how she feels?"

Delivery is the most important element in making the invisible injury seen. Delivery is how you convey your ideas by way of voice, pacing, gesture

and movement. This will be addressed later.

Bringing it all together

The difference between a good opening statement and a great opening statement is how effectively you can bring all five elements together.

Let's look at two types of invisible injuries: physical pain and emotional distress. How can the attorney make these injuries visible to the jury? No matter how severe the pain is, it can't be objectively measured. No matter how debilitating the emotional distress is, it can't be seen. Some attorneys may disagree and say you can measure pain and you can get objective verification of emotional distress. True, you can tell the jury that the medical records show that the plaintiff consistently rated his pain as an 8 out of 10. You can tell the jury that the psychological tests objectively place the plaintiff's depression in the moderate to severe range. You can display medical records and the psychological test results on your PowerPoint so the jury can see the pain and the distress. But that doesn't make it real.

The attorney needs the jury to see the injuries in their own mind. How is this done in opening statement? Consider using the following techniques to help the jury become part of the story. Use the active voice, not the passive voice. Use the present tense, not the past tense. Use words that allow the jurors to use their sense of sight, sound, smell and touch. Use short sentences. Speak slowly but speak up. Make meaningful gestures.

If this were a medical-malpractice case with a cancer patient and an important part of the case was the devastation the patient felt when she was told, too late, that she had cancer, many attorneys would give an opening statement like



this: “On Tuesday May 15, Mrs. Sally Jones is in the doctor’s office. She sits down. The doctor comes in. They exchange pleasantries. The doctor tells her he has some bad news. He tells her she has cancer. This news is devastating.”

The Trojan Horse Method

The Trojan Horse Method uses a different approach. “It’s Tuesday, May 15. Mrs. Jones is in the doctor’s office. The doctor comes in. “Good morning, Sally.” “Good morning, doctor.” “I’m afraid I have some bad news.” “What’s wrong?” “You have cancer.” The impact of telling the story through dialogue rather than “She says...He asks...She replies...He responds...” is hard to appreciate in writing, but it is powerful when done in person.

When you say “I’m afraid I have some bad news,” you say it in the same tone of voice as the doctor would. Your face expresses the concern the doctor must feel. When you reply as Mrs. Jones asks, “What’s wrong?” you do it in Mrs. Jones’s voice and with the frightened expression on her face. You might bring up a hand to cover your mouth. Emotional congruence is when the voice and gestures are in sync with the spoken words. The jury is brought into the action. It is credible and memorable.

Emotional congruence

Even if you don’t use dialogue to convey the information, when talking about injuries it is essential that the attorney is emotionally congruent with what he is saying. Emotional congruence is the cornerstone of the Trojan Horse Method.

Emotional congruence is having the correct emotional state based on the specific event or injuries you are relating. Emotional congruence gives the speaker credibility.

Some people may say that emotional congruence is nothing more than method acting. The actor, when delivering lines about a painful event, remembers an actual painful event that happened to the actor. When the actor does so she is no longer just reciting words. The emotional memory will affect the tone, volume and cadence of her voice. Her facial expressions will be consistent with the words she is saying. The gestures will be genuine.

When talking about how the plaintiff was before the injury and how she enjoyed her life, the attorney’s voice, gestures and expressions match the good feeling she had. When the subject changes to how the plaintiff is now, the voice becomes softer, the cadence becomes slower, the face and the entire body becomes sadder. When the attorney is emotionally congruent, the jury understands the harm the plaintiff must endure. The jury can see these otherwise invisible injuries in their mind’s eye.

This method, if done right, is effective. But be careful. If done improperly, it can irreparably damage your case because you come off as a phony, as an attorney who is trying to manipulate the jury. You’ll never be able to regain your credibility.

Conclusion

A powerful opening statement is important whether the injuries are visible or invisible. Spend the time to prepare it

and rehearse it. If your opening doesn’t sound or feel right when you practice, don’t be afraid to edit and re-edit until it does. Look to see how you can make the opening shorter. Look to see that there are good transitions when going from one event to another and from one injury to another. Videotape the opening to see if you are emotionally congruent. Then practice it again and repeat the editing process until you have it right.

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Mr. Denove was named the 2017 Loyola Law School Champion of Justice Honoree. In 2018, he was inducted into the CAALA Hall of Fame.

