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How The Defense Can Win Verdicts And Influence Juries

Law360, New York (April 28, 2015, 11:07 AM ET) --

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Although he wasn't a trial attorney, Dale Carnegie knew a thing or two about persuasive speaking. As litigators, much of our communication tends to be persuasive, but never more so than in a jury trial. This article considers methods to persuade your jury, from opening statements through closing arguments, applying the tried-and-true framework for influential speaking attributable to Carnegie himself: "Tell the audience what you're going to say, say it; then tell them what you've said."

Tell Them What You're Going to Say

Opening statement should be about engaging the jury and establishing credibility. This is often the first intimate interaction with the jurors, particularly in jurisdictions in which the judge runs voir dire. Members of the jury were probably more concerned with getting out of jury duty than evaluating you during voir dire, so opening statement is your chance to make a solid first impression.

There are many different strategies for organizing and presenting an opening statement, and they can often be blended to best suit your facts, law and personality. The narrative or storytelling method has been touted as the preferred method of connecting to a jury in opening statement. However, in order to establish a credible rapport, it is best to be natural and true to yourself. If you are not a born storyteller, but more of a Joe Friday, you may prefer a legal-expository approach, emphasizing the elements of the tort, jury instructions and burden of proof.

By presenting the expected evidence in a strict construct, it will color how the jury interprets the evidence when they hear it through the witnesses. Studies have shown that, from a defense perspective, there is little difference in the outcome of a case based on whether defense counsel employs a folksy, narrative style or a more straightforward, fact-based style in opening statement. The critical takeaway from opening statement is to leave the jury with a framework in which it can receive and analyze the evidence of the case.

Tell the defense story after showing the jury the lens through which to view it (i.e., the applicable law and jury instructions). Once you have set up the framework, the jury will be inclined to apply it to the facts you lay out for them. This approach increases processing and recall by allowing the jury to make

instant connections between facts, facts and witnesses, and facts and law. Each connection we have to an idea enhances recall. And the more a jury recalls and considers your viewpoint, the truer it will become to them.

Following the plaintiff's opening is an uphill battle, because the jury will have already formed an impression of the case based on the plaintiff's version of events. It is up to the defense to correct this misconception immediately, before it can take hold in the jury's mind. Opening with a key fact or prima facie element that was left out of the plaintiff's version of the case can help reshape the issues. You can bet the opposing counsel will leave something out of his story, so use any omission to your advantage by being the one to introduce all the key facts — even the ones that could hurt your case. Unless you think you have a good chance at keeping a bad fact out of evidence, own it. You might as well bring it up on your own terms and control the fallout.

Keep in mind that, although opening statements are not evidence, only what will come into evidence should be stated in opening. You will lose credibility if you are not able to back up the promises made in opening statement. But by making — and keeping — promises to the jury, you build credibility and rapport. Many jurors report forming conclusions based on opening statements, so if you win the credibility contest on opening you have a better chance of winning the case.

Say It

Juries are smarter and much more perceptive than typically credited. Through the use of verbal and nonverbal cues you can help the jury hone in on the facts you believe to be the most important, so they can properly construe them in the framework you laid out in opening.

Using plain English instead of legalese will help to clearly relate even the intricate issues of your case. One way to get a message across on a complex issue is to break it up into small, easily digestible pieces. Even on direct examination, one can break up the testimony with directional questions so that a witness does not drone on, losing a jury after the first sentence. Verbal cues such as, "Drawing your attention to ..." or "Before we address X, let me ask you about Y ...," guide not only the witness but the jury to where you are going with the evidence. If the jurors know where you are going, they are more likely to meet you there on their own and stay attentive. During direct examinations in particular, the questioning attorney should watch the jury for signs of agreeable points to highlight in cross-examinations and closing, as well as for fatigue and incomprehension.

When constructing an examination, consider using tools that will aid the jury in its ability to process and store the points of the testimony. For example, because of an effect called "chunking," grouping a series of topically related questions together has been shown to enhance recall. Also, issues presented in a temporal order tend to have higher recall ratings than information given in a strictly topical or relational format. So addressing the points within a topic in a chronological sequence will give the jury the best chance of remembering the information as you present it. And don't forget to weave the theme of your case into your examinations. As information processing is all about connections, having a witness draw or agree to a connection to another fact or witness will help grow the web of connections in the jurors' minds so they can better understand your case.

Using the primacy and recency effects to your benefit will also help score more points with the jury. Because of the effect of primacy, recency and serial positioning, the jury tends to assign more weight to the first and last points made in any of the trial components. Starting with a strong point right out of the gate will give it due effect in the minds of the jury, but will also help the jury in processing the rest of the

message. Likewise, the jury will attribute more weight to the final question of an examination than the several preceding it. So if you end your cross-examination with some emphatic statement with which the other side's witness is compelled to agree, then regardless of its actual import to your case, the jury may conclude you won the witness. To this end, it helps to have one bulletproof question in your pocket for cross-examination — not an essential question, in case you get a surprise response to an earlier question and want to sit down on a high note, but one that helps your case and leaves no wiggle room. This will employ the recency effect to your advantage.

The use of demonstratives can help tell your client's story through witnesses. Even the most complex medical causation issues can be broken down to a sequencing illustration with arrows showing cause and effect. Using as many mediums as are available in the courtroom and within your comfort level will increase your chances of getting through to and connecting with the jury on critical points. Easels and flip charts, for example, are still an effective, low-tech way to discredit the opinions of the other side's expert. List the assumptions that form the basis of an expert's opinion as he testifies, then strike them out through cross-examination or through the testimony of your own expert to demonstratively discard each assumption you can.

The ELMO is a great tool for displaying multiple documents without slowing the pace of an examination because of its versatility in allowing you to easily switch out documents on the fly, or even write directly on the document to emphasize a point. If you've mastered the ELMO, try document presentation software to add more "goodies" to a record, like call-outs, highlights and circling key references. Blow-up demonstratives have their pros and cons: because they have to be printed in advance, they are static and cannot be changed to tailor-fit a witness' testimony; but they can be taken back to the jury room for deliberations and also may be left in view of the jury where a bored juror will study them. The bottom line with technology or any demonstrative aid is that if it does not further the purpose of illustrating your story to the jury, do not use it.

Also remember that the jury sees everything — everything — that goes on in the courtroom. They pick up on your nonverbal cues like your deference or indifference toward a witness and any reaction to testimony, objections or rulings. Jurors observe even more when there is no witness on the stand to distract them. Even a facial expression or mouthed comment can make a negative impression and chip away at credibility — so can any indication of insincerity. Jurors will tend to have a more favorable perception of attorneys who are equally respectful and polite to everyone in the courtroom, not just to the judge. If a trial is a performance, then the entire courthouse and surrounding area is your stage and your words and actions are always in the spotlight.

Tell Them What You've Said

During closing, remind the jury of the promises made in opening, and especially those which were not kept by opposing counsel. Explain how you made good on your promises and explain why the evidence supports your theory of the case and, ultimately, your desired verdict. In going through the facts, you will trigger retrieval by connecting the piece of evidence to the witness who introduced or developed it. Try to tie each section into your main theme of why you should win the case. When the jury deliberates, you want them subconsciously echoing your mantra.

Closing arguments are the last chance to speak to a jury before they decide your client's fate, so framing the issues for them here is critical. Studies have shown a correlation between the use of the legal-expository method to deliver a defense closing and lower apportionment of responsibility and monetary damage awards. The legal-expository structure has the benefit of presenting the jury with stop signs,

each one an opportunity to find for the defense. Walk the jury through the elements of the counts with your own version of a decision tree. Feed the jury the pieces of evidence that will move through the flow chart to the desired outcome. Explain why other routes are cut off, by bad evidence or insufficient evidence from the other side. If your model is supported by the jury instructions, the jury will feel free to make their choice using your model, but should ultimately come to one conclusion. Then, give them that conclusion — spell out the verdict and why the evidence necessitates it.

You take your jurors as you find them, so you may end up with an amalgam of learning and communication styles. Thus, it is best to utilize multiple cues in relaying your message, so as to reach as many jurors as possible. Use everything at your disposal: the volume and speed of your speech, dramatic pauses, gestures and body language, as well as the demonstratives created by and for witnesses and the key documents and photographs that came into evidence — everything to paint your version of how the story ends when the law you laid out in the opening is applied to the facts the jury heard from the witnesses.

Apply this framework in your next jury trial, bench trial or oral argument by carefully considering your audience and how your organizational and presentational style will persuade them.

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