

BRAIN LESSONS – THANKS OR NO THANKS

My mother's insistence that I always be polite and say "thank you" has generally held me in good stead. But in an opening statement?

In an article this author recently read, the writer urged that the first sentences of an opening statement thank the jurors for performing their civic duty, a duty only free people can fulfill. To that writer, this was supported by psychological research, particularly regarding the "fundamental attribution error [FAE]."

From what I have studied about FAE, and all I have been told and personally have taught about primacy, this seemed wrong. But the writer was an accomplished litigator, so I put this suggestion to some of our listserv's "Brain Lessons" colleagues. None agreed. Here are the sentiments:

Grant Rost:

My first thought is, "I don't think that I care much what the experiments have to say." Why? Because at that point in the trial, you have little actual reason to thank the jury. You've gone through *voir dire* and you've probably appropriately and sincerely thanked them for their openness and willingness to share or be vulnerable—as the situations arose for that kind of thank you. So, the principal, **authentic** reason to thank them at that point in the trial is already out of the way. Am I grateful they're performing their civic duty? Probably not yet, because they might not see their task in the trial with the same importance that I see it. They might not be serving from a laudable or praiseworthy sense of duty. At this point, they might just feel stuck or silently bitter about the fact they have to serve. I don't know yet and they may not even know yet. So why thank them at this point?

Which leads me to my main point: Thanking them, even if some experiments say it has a decent effect, seems to me an exercise in hyperbole at best and dishonesty at worst. I won't teach it to my students because it tells them inauthentic communication to a jury is OK, so long as it is a means to an end. It runs the risk of alerting the "insincerity detectors" of one or more jurors and, thus, seems an uncertain and unnecessary gamble.

Mike Golden:

Here's my short answer: no, no, and no.

Slightly longer answer: First, no, I'm not buying this at all. (By the way, not only does the sample opening statement begin with a "thank you," it also begins with the lawyer introducing himself which is no better.)

Second, no, I don't see how this meaningfully relates to fundamental attribution error. I will gladly admit there are folks on this email who understand the complexities of human psychology and persuasion better than I do. But I've never viewed fundamental attribution error as a particularly complex concept in the grand scheme of psychology. To me, FAE most simply refers to the idea that when another person does something negative (it doesn't have to be negative, but it seems more powerful when it is), we are more likely to attribute that negative behavior to them having a negative character. On the other hand, when we view our own negative behavior, we are more likely to view it as a product of the circumstances affecting us. As one of my favorite psychologists, Dr. Bob Duke, says, "We judge others by their actions but we judge ourselves by our intentions." I can see the logical leap the author uses to try to tie FAE to this situation, but, no, it doesn't work for me. (By the way, he is citing himself in this footnote you quoted.)

Third, no, it's simply not, even if viewed as sincere, worth the sacrifice of primacy. I don't have to tell anyone on this email how and why primacy is so important. A hill I will die on is that you should always start opening statement with something incredibly important. For reasons I have seen eloquently expressed by each of you at some point at EATS, primacy helps with framing, can drive connection, and really focuses attention (through, for example, the reticular activating system). But this particular example is really bad for a related reason that I have seen called "sensory gating," which is just another concept related to the ideas about cognitive load that Adam talks about in his paper: when your audience thinks "oh yeah, I know this part; it's the part where he says thank you and introduces himself," it stops paying attention because it thinks it knows what is coming next and therefore doesn't need to spend the mental energy to actually listen. And if my opponent is doing that at the beginning of their opening, then I should be thanking them.

Adam Sokoloff

The article treats the opening "thank you" as an attribution problem: will jurors hear it as sincere? I think that asks the wrong question. The better question is functional: what should the first words of opening accomplish? To me, they should focus attention, establish the frame, and begin the story. A generic "thank you" may be polite, but it does not do the work opening words need to do.

Members of the email chain,

Sorry! I had to open to like that. Had to. In large part because Mike and Grant have already captured most of my reaction – and articulated it far better than I would have. I agree with Mike that the fundamental attribution error point is doing far too much work here, and I agree with Grant that authenticity is critical.

At most, the cited theory might support the modest idea that some jurors could attribute a lawyer's "thank you" to genuine politeness rather than pure convention. But so what? Sincerity is not the measure. Usefulness is. The first words of opening are simply too valuable to spend on a largely hollow ritual. A generic "thank you" does not frame the evidence, begin the narrative, or create meaning. It is cognitively inert. And because it is so conventional, it may also, as Mike pointed out, have the opposite effect of what the lawyer wants. Jurors recognize courtroom throat-clearing. They know this part. That familiarity risks lowering attention at the very moment we should be heightening it. TERRIBLE STRATEGY.

Grant's authenticity point makes the problem worse. If the thanks is fully earned and genuinely felt, fine — there may be some other place for it. But if it is just a stock opening move, then the lawyer has traded primacy for convention and maybe even put their credibility at risk. Obviously, none of us would suggest that lawyers should be rude or performatively intense. Jurors should feel respected. But respect can be communicated through clarity, preparation, restraint, and taking their task seriously. It doesn't require donating the first line of opening statement, especially when it risks being seen as disingenuous genuflection. NOT WORTH THE RISK.

So, I'm with Mike and Grant: even if some jurors hear the "thank you" as sincere, that modest gain is not worth the loss of primacy. And if the thanks is perceived as not authentic, it is worse than wasted.

Marian Braccia

I agree that an advocate should not surrender primacy to a mandatory "thank you." But I am reluctant to replace one categorical rule—*always begin by thanking the jury*—with another categorical rule—*never thank the jury*. This is largely a matter of individual style, and it is highly dependent on geography and local culture.

In Philadelphia, where I practiced, jurors tend to possess finely calibrated detectors for anything that sounds corny, ingratiating, or performative. An advocate who begins with a conspicuously effusive expression of gratitude risks being perceived not merely as wasting the jurors' time, but as trying too hard to win their favor. Once jurors decide that a lawyer is "putting it on," that judgment may affect how they receive everything the lawyer says

afterward. So even if the fundamental attribution error could cause some jurors to perceive the thanks as sincere, other jurors—or perhaps the same jurors in a different courtroom culture—might view it as transparent advocacy or even sycophancy. Lawyers must know their audience.

That does not mean there is never an appropriate time to thank jurors. If the gratitude is genuinely felt and expressing it is natural to the advocate's voice, I would place it toward the end of closing argument, when the jury has actually done something for which the lawyer can authentically thank them. By then, the jurors have listened to the evidence, given their time and attention to the parties, and are preparing to undertake the serious work of deliberation. The gratitude is no longer anticipatory or ceremonial; it has been earned through a shared experience.

I would not make it the final line, however, because recency is no more expendable than primacy. Instead, the thanks might be incorporated shortly before the closing appeal:

“The case will soon be yours. [My client and] I want to thank you for the time, attention, care, and open-mindedness you have already given this case—and for the care you will bring to your deliberations.”

The advocate can then return to the central theme and conclude with the precise verdict the evidence requires.

So my objection is not to gratitude. It is to compulsory courtroom gratitude detached from the advocate's voice, the audience's sensibilities, and whether the jurors have yet done anything meaningful for which to thank them. Primacy should not be sacrificed to convention. But if the thanks is authentic, earned, and suited to both the speaker and the jurisdiction, there may be a place for it—just not necessarily at the beginning, and certainly not at the very end.

And A Psychologist's View?

And as to the 'science' and fundamental attribution error (FAE), I turned to Jonathan Vallano, whose PhD is in Psychology, with a specialization in Legal Psychology. Here is what he wrote:

[In FAE], essentially, observers tend to underestimate the impact of situational factors on an actor's behavior, instead primarily (and therefore often mistakenly) attributing their behavior to dispositional factors (i.e., that is who the person is, or in other words, “*This person did that because that's who they are*”). For example, when a driver cuts off another driver on the road, the aggrieved driver may default to attributing the driver's behavior to their disposition (i.e., they are a {insert insult

here)) rather than considering that some situational factor may have caused them to act in that manner (e.g., something was in the road that required the driver to quickly move into the other driver's lane).

My general impression is that this [the law review's] specific point regarding the application of FAE to support the idea of an attorney thanking jurors at the beginning of their opening statement may miss the mark a bit. First, the assumption is that the perceived sincerity of the attorney is important. Is it? There's some data to suggest that jurors don't spend much time discussing attorneys in the first place, implying attorneys' dispositional characteristics may not be too influential on jurors' judgments (see, e.g., Shari Diamond et al., 1996). And even if jurors did spend great time and thought on attorneys in this manner—and attorney sincerity matters (see Monica Miller et al., 2010, for some evidence that it does)—does it also follow that an arguably perfunctory statement, such as thanking jurors for their service, would translate into higher perceived sincerity, and that this increased sincerity would affect jurors' legal judgments? I'm skeptical.

To my knowledge, the primacy effect has more research support and has been applied to opening statements, which is also generally consistent with theories of how jurors cognitively process evidence (see, e.g., Lawrence Wrightsman, 1987; though note that myriad variables influence whether a primacy effect will occur and how powerful it may be). Now is the first sentence—thanking jurors for their service—uniquely powerful in potentially facilitating a primacy effect versus just the entire opening statement as a whole? I'm not sure this has specifically been examined, but overall case framing/story creation in opening statements has been shown to shape jurors' legal perceptions and judgments (see, as the most prominent example, Nancy Pennington & Reid Hastie's work on the Story Model of Juror Decision-Making). Thus, an opening statement that discusses and explains the evidence within the context of a plausible and consistent story should arguably be a larger focus for attorneys seeking to shape jurors' case perceptions/judgments, whether it begins with thanking jurors or not. After all, jurors generally attempt to focus on the task at hand—and largely do so—which suggests that prioritizing a preview of the evidence to be presented should be the primary focus during opening statements. After all, jurors' perceptions of the strength of the evidence is generally found to be a strong predictor of juror and jury verdicts (see generally the classic work *The American Jury*, 1966, by Harry Kalven and Hans Zeisel, along with Brian Bornstein and Edie Greene, 2011, for a brief summary).

Where does this leave us? A seeming consensus – notwithstanding my mom’s urgings to always be polite, time is better spent seizing the moment than thanking jurors – and jurors will be thankful for lawyers who get to the point, don’t waste time, and give them the framework needed to understand and resolve the case.