

## OPENING STATEMENTS: THE ART OF STORYTELLING

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The doors of the movie theater fly open. Crowds of moviegoers pour out. They are somber. A few talk quietly, but none are smiling. Some are crying, while others just sniffle. What has affected them so? Leonardo DiCaprio has just gone down with the Titanic. Next door, a crowd sits in the dark on the edge of their seats. Some have their hands over their eyes. Others suppress a scream. The T-Rex has just eaten a lawyer in Jurassic Park. Across town at the airport, a man sits in the lounge reading a well-worn paperback novel. He turns the pages methodically, his eyes never leaving the pages. Nothing breaks his concentration — the crowds, the blaring loudspeakers, the general hubbub of thousands on the move. On the next aisle another person reads a paperback, dabbing moist eyes with a tissue. A few miles out of town, gathered around a roaring campfire, listeners shiver slightly as they hear a tale of haunted woods and visitors in the night.

All of these people, like most of us, love a good story. They permit themselves to become so consumed by the story that they forget the one thing they know from the beginning about that story: it is a total fabrication. It is fiction. It is untrue, and they knew that when the story began. Yet, somehow, they have allowed themselves to believe the unbelievable.

How could this happen to an intelligent person? The human phenomenon that has enabled that person to become emotionally involved in a story that is utterly false is referred to by novelists as the suspension of disbelief. They are willing to allow themselves to be fooled. They have given the storyteller permission to lie to them, and, in return, they have promised to become genuinely involved in the lie. They are voluntary captives to the magic of the story.

But is the act of surrender to the storyteller really voluntary? Was it really the moviegoer who consciously decided to suspend his

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disbelief? Or could it have been the storyteller, or even the story itself, that somehow induced the suspension of disbelief? It is the thesis of this Article that many times the magic spell of a good story is actually cast by the storyteller. Casting this spell is an art that excellent trial lawyers use in every trial. Storytelling in the opening statement is all about the creation of strong mental images that will endure throughout the trial.

### *I. THE LAWSUIT AS A STORY*

The trial of any lawsuit involves the re-creation of an event or events that occurred long before the litigation arose. By its nature, the process requires the lawyers to communicate to the jury what happened and why it happened. It demands of the trial lawyer an ability to, largely by words, describe an occurrence, breathe life into the people who played a role in the occurrence, and lend some human significance to the event. A trial is a retelling of the story of the occurrence. The tale is repeated in various ways by different people during the trial. The lawyer is a storyteller during voir dire examination in some jurisdictions, in opening statement, and in final argument. Also, while witnesses tell the story during direct examination, the lawyer once again becomes the storyteller during cross-examination.

Most importantly, it is essential that the trial lawyer recognize that what is taking place is only slightly different from that which occurs around the campfire, in the movie theater, or at the child's bedside. He or she must realize that it is a form of communication as old as humankind itself.<sup>1</sup> It is an art form that long preceded the advent of the trial lawyer. Yet, its objective is the same: to communicate to an audience the occurrence of some event, and to do so in a way that will affect the audience to the desired result.<sup>2</sup>

The critical essence of a good story is that the storyteller creates in the listener a strong visual image of the occurrences that are the

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1. See Marsh Cassidy, *The Art of Storytelling* 13 (Meriwether Publg. Ltd. 1994) ("In all probability storytelling is nearly as old as spoken language. Most certainly it existed for years before the written language came into being, and it continued on up through the centuries when only a small percentage of the population knew how to read.")

2. James W. McElhaney, *Hit Themes: Weave Your Facts into a Story the Jury Can Follow*, 84 ABA J. 88 (Aug. 1998).

story.<sup>3</sup> The objective of the trial lawyer is to cause the jurors to visualize the events and picture the story as the lawyer desires it.<sup>4</sup>

Of course, there are limits to looking at the trial process this way. While there is a strong parallel between lawsuit storytelling and storytelling as entertainment, the parallel is not exact. Like any analogy, it can be taken too far. Therefore, a word of caution is appropriate. If the jury ever comes to believe that a lawyer is trying to tell a good yarn, then the effort is a total failure. The lawyer loses credibility, and the client loses the case. This methodology should not be taken too far and demands some subtlety. Thus, exaggeration, melodrama, or the use of props, dialogue, or other such overtly theatrical devices can doom the storyteller to failure. As with anything done in the courtroom, sincerity is the watchword.<sup>5</sup>

## II. PREPARING TO TELL THE LAWSUIT STORY

Success in lawsuit storytelling comes in large measure because of preparation.<sup>6</sup> Good stories do not just happen spontaneously in the courtroom. They are the product of careful thought and detailed planning.

Some notion of what makes a good story is essential to preparation. This concerns not so much how the story is told, as what constitutes the story itself. Of course, a trial lawyer must tell the story that the evidence presents. However, the lawsuit storyteller still has some discretion in how the story is characterized, what

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3. See *Homespun: Tales from America's Favorite Storytellers* 299 (Jimmy Neil Smith ed., Crown Publisher 1988) [hereinafter *Homespun*] (“[S]torytelling recalls to us in this modern age one of the special aspects of being human: the ability to shape and create, both in the real world and the infinite one we call imagination. We don’t need actors. Or scenery. Or props. Or music. Just by listening, we can see real people, doing real things, and they’re going more places than we could ever replicate on stage or screen.”).

4. See Peter L. Murray, *Basic Trial Advocacy* 9 (Little, Brown & Co. 1995) (“A successful storyteller conjures up a visual image by the use of words and other media so essential features spring spontaneously to life in the minds of the listeners.”).

5. See Robert E. Keeton, *Trial Tactics and Methods* § 1.2 (2d ed., Little, Brown & Co. 1973) (explaining that whatever method is used, the danger of losing the impression of sincerity should be avoided); James W. McElhaney, *Trial Notebook* 107–115 (3d ed., ABA 1994) (explaining that any use of theatrics should not remove responding as a normal person would).

6. See Josephus Daniels, *The Woodrow Wilson Era: Years of War and After* 624 (Univ. of N.C. Press 1946) (quoting Woodrow Wilson as saying, “If I am to speak for ten minutes, I need a week for preparation; if fifteen minutes, three days; if half an hour, two days; if an hour, I am ready now.”).

parts of it to emphasize, and how to interpret the conduct of the characters.

#### A. Identify the Humanity of the Story

Good stories involve people. They are human stories in which people are caught up in some struggle or tragedy. Lawsuit stories, like any story, revolve around a protagonist and an antagonist. The trial lawyer must find this story no matter how deeply it may be buried in the file.

Criminal cases, of course, are just the type of stories that jurors find fascinating. It takes little imagination to identify the humanity in such cases. Tort actions involving death, serious bodily injury, egregious conduct, or any actions resulting in human suffering, also provide the stuff of great stories. Still, the presentation must be carefully planned so that it is a story not just of a defective product — a thing — but of a person whose life was tragically changed by a defective product.

Other lawsuits, such as commercial or property cases, are more challenging to the storyteller. A trial of trespass or title action must be about a person's love for the land and not about metes and bounds. While a legal controversy may turn on the language of a contract, there is little human interest in legal words contained in the four corners of a legal instrument. The story *cannot* be about the document or the words. The story *must* be about the people affected by the contract. Somewhere, perhaps hidden to superficial examination, there are human needs, desires, feelings, and emotions. Perhaps it is the story of a person following a lifelong dream to build a business by hard work, sacrifice, or just the willingness to risk what he or she has in order to make something better.

Lawsuit stories often suffer from their close association with lawyers. Many lawyers cannot help but choke the humanity out of a story by reducing it to its legal essentials. Thus, a story of a broken promise becomes a breach of contract. A story of the tragic death of a loving husband becomes a cause of action filed by a survivor seeking money damages for wrongful death of her spouse. This is not only incomprehensible, but also deadly boring and minimally persuasive. No good campfire tale ever began, "the plaintiff alleged . . ."

Whatever the legal cause of action, the trial lawyer must delve deeply into the facts and circumstances that gave rise to the claim. No matter what the nature of the claim, there must be an underlying human story, and it is the job of the storyteller to creatively

capture it. If this essential step is neglected, then the lawsuit story will be as lifeless as the statutes and case law that created it.

### B. Identify the Emotions of the Story

All human stories are driven by emotion. All human conduct results from some emotional underpinning. It is the blending of that emotion into the story that gives a lawsuit story its power.

Each significant part of a lawsuit story carries its own emotional mood. It is a rare story that is driven by only one emotion. A sad story, for example, is rarely entirely sad. If the emotional voice of sadness permeated the entire story, then it would lose its impact. The power of the sad story comes in no small measure from a pre-existing happiness. Thus, the emotional structure of a wrongful-death suit includes a story of happiness in the relationship of husband and wife prior to the accident, contrasted with the emotion of horror at the time of the accident, and succeeded by sadness in the end. Perhaps part of the story involves careless and reckless conduct of the wrongdoer. The emotional mood of this part of the story might be anger.

Matching the emotions with the appropriate parts of the story is important. The emotional mood determines the way in which the story is told. The emotion is reflected in the manner of delivery. The storyteller communicates the emotion primarily by his or her voice, facial expression, pace of delivery, and word choice.

### C. Identify the Character Traits of the People Involved

Juries decide cases, in large measure, based upon who they trust, who they respect or admire, and who falls short of their expectations. Many jurors reach their verdicts using their instincts, intuition, understanding of human nature, and, of course, a rational process of weighing the evidence. However, many, and perhaps most, jurors tend to make a decision based upon emotion and then justify it in the evidence. In short, jurors make decisions about what is true based upon their evaluation of the people involved — who they are, what kind of people they are, and whether they seem trustworthy.

The story must, then, develop the nature and character of the people involved. Because the story is a human one and turns on human emotion, it is often the case that the conduct of the people involved can be explained by their character — what kind of people they are and how they react to human problems. Developing the

character of key players as a way of explaining why things happened the way they did provides a useful opportunity to address the virtues and vices of those whose conduct is under scrutiny.

Finding a fit between the character of a person and the relevant conduct of that person is a key to effective use of character. Jurors seem to be more sophisticated now than in the past. Many jurors readily see through gratuitous praising of the virtues of the parties. They may see such actions as attempting to persuade them to decide the case on something other than the relevant issues and actions of the parties. On the other hand, if jurors see the nature of a person as playing a role in the events at issue, then it seems to them something logical and properly considered. Therefore, a close connection between the character of those involved and the factual dispute is important.

Thus, it would be hollow, thinly-veiled pandering to merely extol the virtues of a party — charity work, church attendance, community service — without connecting the character trait to conduct relevant in the lawsuit. Charity work, church attendance, and community service probably flow from a strong belief that helping others is important. That is the essential character trait of the party. If the party engaged in relevant conduct for the purpose of helping another, then praising the party for selflessness is not pandering, but rather explaining the conduct.

The most powerful character traits include courage or cowardice, honesty or dishonesty, selflessness or selfishness, generosity or greed, sensitivity or insensitivity, kindness or cruelty, loyalty or disloyalty, tenacity or weakness, and a strong or weak work ethic.

#### D. Identify the Structure of the Story

Whether the story is one for the courtroom or the campfire, it needs a logical structure. It is structure that makes it understandable and easy to follow. A wandering and formless story causes confusion, lack of comprehension, and, ultimately, daydreaming. It is essential that the trial lawyer outline and understand the structure of the story before beginning to communicate it to the jury.

Most opening statements contain the following essential parts: introduction, identification of the issues, personalization of the party, narration of the events, discussion of weaknesses in one's own case, and conclusion. It is the narration part of the opening statement where storytelling comes most into play.

The opening statement, of course, has an introduction and a conclusion. Technically, neither the introduction nor the conclusion

is a part of the story. Rather, they are more like the prelude and the postlude. Yet, each is important to the understanding of the story. The introduction serves to identify the characters, set the context of the story, and inform the jury of anything they might not readily understand.<sup>7</sup> The typical introduction begins with a brief, powerful, and complete overview of the entire lawsuit. For example:

This is a case about the tragic drowning death of a five-year-old little boy named Billy. You see, on July 7th, just three years ago, Billy Peterson fell into a dangerous pit filled with water so dark that he could not see that the pit was deep and deadly. And Billy, struggling to survive as he gasped and gulped down the dirty, brackish water, died a slow and painful death. That deadly pit was on the defendants' property. They owned it. And by their gross neglect and conscious disregard for the safety of others, they caused the death of this innocent, energetic young boy. Today, his mother comes before you for justice in the name of Billy Peterson.

The conclusion draws the parts of the opening statement to a close. It brings together the statement of the nature of the case, the explanation of the fact issues, and the story itself. It draws a conclusion about the fact issues from the story just told. It presents both the theory and the theme of the case.

The story itself has its own structure, of course. Typically, though not always, it is based upon a chronological narration of the events. Occasionally, certain stories suggest a variance from a chronological order. Perhaps, pure chronology would cause the story to be less interesting because the climax of the story is so long in coming or it would require the introduction of too many unfavorable facts before the story works its way around to the favorable events. In these instances, it might be more appropriate to begin with the climax and then, in a flashback fashion, recount the events leading up to the climax.

Consideration must also be given to the point of view of the story. A story can be told from differing points of view and may be radically different depending upon whose eyes the events are seen through. For example, a simple car wreck could be told from the

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7. See *Homespun*, *supra* n. 3, at 337 (“[Y]our stories will need introductions to create a setting, introduce the characters, explain any obscure words or phrases, and give whatever background is necessary for the listeners to better understand and enjoy the tale and your telling.”).

point of view of either driver. Conventional wisdom requires the parties to tell the story from their own point of view. However, it may be more effective for the plaintiff to tell the story, at least in part, from the point of view of the defendant. This would be particularly persuasive, for example, if the defendant had been going from bar to bar and drinking heavily before the accident. Another way of telling the story would be to tell it from the point of view of both drivers. That is, the plaintiff's lawyer might begin by telling the story from the plaintiff's point of view. A story of an ordinary, peaceful drive in the country, leading up to and through the collision. Then, shifting perspective, the plaintiff's lawyer might tell the rest of the story from the point of view of the drunk driver.

Another consideration on the structure of the story concerns a technique that the novelist often uses — foreshadowing. Foreshadowing is an effective device to build drama and keep the listener interested. The novelist, of course, generally indulges in foreshadowing at the end of a chapter. The goal is to keep the reader turning pages. Likewise, in the opening statement, the trial lawyer might use foreshadowing to draw the jurors into the story. This technique injects mystery and suspense into the story. For example, after telling the jury that the plaintiff left home on the morning of the accident, the impending tragedy might be foreshadowed: “When he kissed Sarah goodbye, he didn't know that it would be for the last time.”

When considering structure, the trial lawyer must also identify where the story begins to build toward the climax. Most stories have more than one place where they build to a climax. It is essential to understand where the story builds to its lesser high points, as well as when it builds to its final climax. This understanding is important because the manner in which the story is told must contribute to building toward the climax. Typically, this is done with the voice, by altering the pace and volume of delivery.

#### E. Identify Details That Help Listeners Visualize the Story

A good story is rich in detail. It creates in the listener a vivid mental image of the events and occurrences. In fact, this is the very essence of good storytelling. It is the object of the trial lawyer to create in the jury's mind an image of the case identical to that held by the lawyer. While it is possible for the trial lawyer to create this image merely by reciting the facts without trying to bring the story to life, this depends entirely upon the imagination of the juror. In this instance, the trial lawyer leaves too much to chance. Instead,



the trial lawyer must do everything possible to help even the least imaginative juror see the story unfold.

A rich mental image of the story comes in large part from the degree of detail the storyteller communicates. The more the listener is forced to create the images from his or her own experience, the more likely it is that the image will not match that of the storyteller. The image is suggested and directed by the use of carefully selected details, described with clarity. These details need not be, and indeed many times are not, important to the legal controversy. They are supplied merely to help paint the larger picture.<sup>8</sup> To that extent, the trial lawyer must temper the conventional wisdom not to overload the jurors with detail. Rather, what must be done is to carefully select those details that serve to create vivid mental pictures. Image-creating details stick in the memory, while trivial details tend to spill out from the juror's mind.

For example, suppose that the lawsuit involves a mundane breach of contract. The agreement in question is oral, made by the parties in the office of the defendant. Suppose that the plaintiff's theory of the case is that the defendant, a sophisticated businessman, overreached the plaintiff, an unsophisticated and younger person. The plaintiff wants to create an image of vulnerability. The story of the meeting in the defendant's office might begin like this:

Sam Martin put on his best suit on the morning of February 7th. He drove downtown and parked in a garage under the Texaco building. He made his way to the lobby, and then to the 53rd floor of the building. Before he went in, Sam straightened his tie and took a deep breath. The office was plush. Thick carpets. Oriental art. Scores of busy people hurrying about. He was taken into a large conference room. He sat at a mahogany table that stretched the entire length of the room. And he waited. Then Mr. Bass came in, followed by two of his associates and the secretary. Mr. Bass was very polished. And very polite. They exchanged greetings. Sam was nervous. His voice cracked a little. Mr. Bass asked his associates to explain the agreement to Sam. It sounded like a great deal. They made it sound like

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8. See Murray, *supra* n. 4, at 61–62 (“There are also a large number of details that do not figure directly in the events in question and therefore are not directly elements of the picture to be portrayed. They can affect how the picture is received, however. Thus, for instance, the make of the eyewitness's car may be a detail worth using if there is a potential issue of the perspective of the witness. Giving the factfinders an image of the place from which the eyewitness saw the accident may make the witness's testimony more 'real.'”).

nothing could possibly go wrong. They seemed so knowledgeable. And so finally Sam said, “Okay, let’s do it.”

#### F. Internalize the Story

The story must be internalized. That is, the trial lawyer must know it so well that he or she does not have to think about the substance of the story. However, it is important that the story, while internalized, is not memorized. This difference is crucial. If a story is memorized, the storyteller then tries to repeat the words that were written and committed to memory. Inevitably, the lawyer will stumble over the words, have to back up and correct a mistake, or, even worse, draw a mental blank on the next words. Additionally, it will sound to the listeners like they are being read to, and that is never effective in a courtroom. This all occurs because the storyteller is struggling to follow a script.

A much more effective way of delivering the story is to know and understand it so well that the trial lawyer does not have to think about what comes next. The story just flows. When his or her mind is not so focused on remembering the carefully scripted story, he or she is free to concentrate on how to best tell the story. He or she can focus on communication and persuasion, rather than the delivery of a canned speech. The result will be much more effective — spontaneous, conversational, and interesting.<sup>9</sup>

How one goes about internalizing a story is more about how one learns any body of information. It will necessarily vary from individual to individual. However, several important considerations must be mentioned. First, the storyteller must know the structure of the story. This is best done by outlining the parts of the story. Outlining helps one remember the story in a conceptual way, rather than by memorization. Second, the storyteller must mentally see the images that must be communicated to the jury. That is, the storyteller must visualize the events before he or she can hope to create such a visualization in others. Ideally, the trial lawyer should be able to play an imaginary video of the events in his or her mind’s

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9. See *Homespun*, *supra* n. 3, at 321 (“We want to internalize the story,’ explains Brother Blue, . . . ‘And when the story is internalized, we’re on automatic. Now we’re free to give the story power — to give ourselves over to the tale and the tellin’.”). Brother Blue is Dr. Hugh Hill, “a man who has dedicated his life to telling stories for social change, for world peace with justice, and for love.” *Id.* at 223.

eye, frame-by-frame.<sup>10</sup> Visualization is a creative process fueled by the imagination of the trial lawyer. The image must be accurate, and so it is necessary to acquire accurate information about the events.

Each frame in the mental video must be accurate. Much of the information necessary to visualize the story will come from testimony about the occurrences. However, a great deal of it must come from observation. For example, the storyteller can learn how the characters appear by observing them at depositions. Additionally, many stories involve places, and an accurate image of the site of an event can best come from an inspection of that site. It is common for lawyers trying a car-wreck case to visit the scene of the accident. A trial lawyer should visit the scenes of the events no matter what the type of case, just for the purpose of acquiring a good mental image of the events.

When it comes time to tell the story that the trial lawyer has internalized in this way, it is a simple matter for him or her to describe, frame-by-frame, the vivid mental images of the events.

### *III. STORYTELLING IN THE OPENING STATEMENT*

#### *A. Shedding the Conventional Wisdom*

Effective use of storytelling techniques in an opening statement requires one to rethink the conventional wisdom in the art of making an opening statement. Convention requires the trial lawyer to be a lawyer, not a storyteller. Convention also says that the lawyer should advise the jury that what is said is not evidence, but only what he or she intends to prove. Further, convention tells the lawyer to liberally sprinkle the opening statement with assertions that he or she is not saying that this is what really happened. To avoid the taboo of an argumentative opening statement, the lawyer prefaces everything with “the evidence will show.” The opener is admonished to depersonalize the opponent by never using his or her name. Each of these notions, because they possess some merit yet impair effective storytelling, must be re-examined.

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10. *See id.* at 319–320 (“I sit down and quietly think about the story,’ states Elizabeth Ellis, ‘creating a set of very vivid mind pictures, trying to see them as clearly as possible, allowing the story to come into my heart. When I tell the story, I describe each picture, each frame. The more vividly I can visualize the story, experience being within the tale, the more vividly I can recount that experience to my listeners.’”).

Because the object of storytelling in the opening statement is to suspend the disbelief of the jurors, it is important to avoid anything that reminds them that they are jurors hearing a lawsuit and that their job is to be skeptical. Every lawyer-like statement that comes into the story tends to break the plane of the story. When the storyteller calls someone “the defendant,” the jurors recall the reality that this is a dispute with two competing stories. With every repetition of “the evidence will show,” the mental images grind to a halt momentarily, and the jurors remember that this is only what the lawyer contends. This is like a phone ringing while reading the exciting climax of a novel. The reader is forced to drop his or her disbelief while dealing with reality, and it may be difficult to suspend it again so readily. In short, the moment is lost.

In order to keep disbelief suspended during the story part of the opening statement, the lawyer/storyteller should drop all references to the lawsuit, the parties, the court, or the jury. The worn out phrase “the evidence will show” should be discarded and retrieved only if the court sustains argumentative objections. This type of opening statement will not be argumentative, however, because the well-told story will argue for itself, without the lawyer drawing conclusions. Indeed, the best story is one that, by its own force, compels a certain conclusion that the listener reaches on his or her own. It keeps the juror involved and interested, perhaps even silently bragging to himself or herself, “I figured that out.”

## B. Good Storytelling Techniques

### 1. *Word Choice*

Word choice is critical. Two things kill a good story: legalese and long, complicated sentences that are encumbered with clauses, modifiers, and multi-syllable words. If the lawyer/storyteller has a model for word choice, it should be the campfire rather than the courtroom. The language should be simple, straight-forward, and easily understood. Big words only hinder some jurors in following the story. It is not even necessary to use complete sentences. Fragments sometimes communicate better orally than proper grammatical sentences. Short words, short sentences.

Furthermore, the words should be vivid and image-evoking. It is elementary trial-advocacy advice, and good storytelling practice, to use charged words such as: “crashed” or “slammed into” instead of “collided;” “gunned down” rather than “shot;” and “mangled” instead of “injured.” Care should be taken, however, lest the story

become overburdened by such verbiage. Occasional use of charged words at carefully selected points in the story is best.

Many times the storyteller can create images more readily by telling the story in the present tense, as if the listener is experiencing the event firsthand. The juror is placed in the vantage point of one or more of the players and almost becomes an eye-witness to the occurrence. Present tense facilitates visualization. Consider this example:

It's the evening of Labor Day. Janet, Bob, and Bill leave the lake house at nine o'clock. They talk and laugh and carry on, like teenagers do. It's been a good day, and Bob is enjoying the company. They go down to the pier and climb into the boat for a relaxing evening cruise. Bob drives, with his twin sister Janet beside him. Bill shoves the boat from the pier and hops in the back. Bob guides it slowly down Buzzard's Bay. The night is dark. There are lights at Sam's Marina off to the right. Bob doesn't see any other boats. He gently veers the boat to the left around the point, heading out into the lake. He feels the lake breeze in his face as he passes the five mile-per-hour buoy. Bob increases his speed gradually. The bow goes up slightly. Just as the bow comes down into a plane, Bob sees something big coming out of the night to his left. It's a boat. A huge boat. And it's coming fast. Right at them. He turns the wheel hard to the left, but it's too late. Everything goes black. Bob comes to. It feels very warm. It's water. The boat is swamped. He doesn't fully understand what's happened. Then he looks to his right. Janet is floating face down in the water.

## 2. *Pauses*

Pauses are the essential companions to vivid word choice. The pause is necessary because it gives the juror time to create mental images of the events from the story told by the lawyer.<sup>11</sup> Mental images cannot be rushed. They must be carefully suggested, encouraged by vivid word choice, and evoked by the passion of the storyteller. Even the best storyteller will fail, however, if the juror

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11. See *id.* at 326 ("Pausing is an effective tool for Doc McConnell. "To enhance the stories I tell, I often stop for a moment — to puff on my pipe, to give a twinkle of the eye, a slight smile, an expression of disbelief that helps reinforce and make more powerful the statements I've just made. . . . [A]nd my listeners are given time to think, to contemplate, to build the mental images of the story."").

is given no time to picture the events. It is a “co-creative process,” requiring input from both the lawyer and the juror.<sup>12</sup>

Pauses also allow the juror to feel the emotions of the story. It is not enough to tell a sad story if the storyteller does not give the listener time to feel sad. If the story includes a feeling of anger at some wrongdoer, the juror must be given the time to get mad.<sup>13</sup>

### 3. *Pace*

Pace is also an important tool of the storyteller because it allows him or her to create excitement or calmness, build towards a climax or coast down from the climax to the conclusion, or just give the listener the variety of delivery that keeps the story interesting. A faster pace is not necessarily created with a more rapid delivery of the words. Rather, pace is quickened with fewer and shorter pauses between words and sentences, simpler words, shorter sentences, and less detail. In contrast, pace is slowed by increasing the pauses, the number of words, and the detail.

### 4. *Volume*

Loud is bad. Many lawyers believe that it is effective to scream, yell, thunder at the jurors, or make loud noises by slamming a hand down on a table. Generally, this just startles the jury, makes them uncomfortable, and, if repeated, causes them to hate the lawyer who does it. A much more effective use of volume is to soften the volume, sometimes almost to a whisper. Care must be taken that all can hear, of course, but people are usually more attentive to a quiet manner than a loud one. If the jurors lean forward slightly to listen, then they are certainly hooked on the story.

### 5. *Movement and Position*

Movement and position should contribute to, and not detract from, the story. The lawyer who paces back and forth while

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12. *Id.* at 299 (“The art of storytelling is a co-creative process, requiring both the teller and the listener, working together, to weave the whole fabric of the tale, the warp and weft of it. While the teller tells the story, allowing it to unfold, the listener creates an image of what’s happening — conjuring up mind pictures — and the story comes alive”).

13. *See id.* at 326 (quoting professional storyteller Jay O’Callahan: “But most of our listeners probably haven’t heard the story, and they need time to see the images, feel the emotions, get to know the characters. So, I try not to rush, and I try to be brave enough to be silent. The most effective moment in a story may be that pause, that moment of silence.”).

speaking will irritate the jurors to the point of distraction. The lawyer who clings to a podium does nothing but build a wall between himself or herself and the listener. Ideally, the lawyer/storyteller should stand about eight-to-ten feet from the jury. He or she should move only when it fits with the story. Typically, movement should occur during transitions between distinct parts of the story. Movement should be natural and limited. The lawyer/storyteller should pick two or three powerful positions in the courtroom from which to tell the story. Then, at the transition points, he or she can move from one position to the next.

As a general matter, a position closer to the jury is better for the softer, more intimate parts of the story. A position farther away, perhaps closer to the opponent's table, might be appropriate for creating a mood of anger against a wrongdoer. Standing beside a client may be effective when talking about him or her.

#### 6. *Eye Contact*

Eye contact is crucial. The good storyteller draws people into the story by engaging each listener. But, just a passing glance is not effective. The storyteller must tell a part of the story to each person, locking eyes with the listener. Each juror must feel personally spoken to.<sup>14</sup>

#### 7. *Gestures*

Natural gestures are effective in storytelling because they aid the listener in creating mental images. While the campfire storyteller might actually act out some part of the story, the lawsuit storyteller is not as free to do so. Rather, the lawyer may use gestures to *suggest* actions, while never actually trying to portray or act out the action.<sup>15</sup>

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14. *See id.* at 336 (“In some cultures, the eyes of the storyteller and the listeners never meet. It is considered rude and improper, so the storyteller tells stories gazing outward or looking at the ground. But in most American cultures, developing eye contact between the teller and the listeners is the first step toward connecting with your audience — reaching out to them, meeting them halfway. When your audience is small, it is easy to look everyone in the eye as you tell — recounting the tale as if it were being told directly to each listener.”).

15. *See id.* at 327 (quoting professional storyteller Jay O’Callahan: “Gesturing, for me, helps make the images more intense and, therefore, clearer to my listeners. But in using gestures, I try to be natural. I make them as succinct, as simple, as possible, and every gesture becomes useful to the story and its telling. I use gestures only if it deepens my listeners’ understanding of the characters or the time and place.”).

#### *IV. CONCLUSION*

Effective opening statements are in part the product of a state of mind. They come from an awareness that the trial lawyer is a storyteller with a fascinating story to tell. If the lawyer never realizes that he or she is a storyteller, then the opening statement will never be a story. If there is no story, then the trial lawyer is left to the luck of the jury summons as to whether the jurors get the right picture in opening statement. Maybe someone will be in the box who does not need help visualizing events, like a Hemingway or a Dickens. Maybe. Most juries, however, are filled with ordinary people who love a good story, but cannot shoot a mental movie on their own. They need a storyteller. Someone to say,

Let me tell you what happened. It was Saturday morning. For the Peterson family it was the best of times. Everything was finally seeming to fall into place. But just before noon, it would become the worst of times. . . .