The Importance Of MDL Bellwether Trial Opening Statements And Closing Arguments

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Federal multidistrict litigations (MDLs) have become a common and familiar procedural setting for manufacturers facing widespread product liability litigation. In theory, MDLs are intended to promote the just and efficient resolution of a large number of similar cases involving one or more common questions of fact that are pending in different district courts across the country. In these circumstances, cases are consolidated into a single court for pretrial coordination, meaning the MDL becomes a procedural tool for coordinating discovery, minimizing the risk of competing rulings by different courts on the same issues, and encouraging the broad resolution of similar claims.

In the MDL setting, resolution – which can take many forms – often comes only after what are commonly referred to as "bellwether" trials. Bellwether trials are essentially test cases intended to provide meaningful information for the litigation as a whole. The concept is to see how legal and factual issues play out in front of juries. The outcomes of these trials color the perceived values of individual cases, which in turn should provide guidance for the value (or lack thereof) of the litigation.

The importance of these trials cannot be overstated. And as we know for many cases, trials are often won or lost by the end of opening statement. Juries tend to crystalize their views of the case (and the attorneys) before a single piece of evidence is admitted or testimony given. As such, opening statements in the context of a single bellwether trial have the potential to influence the value of thousands of other cases. But with trials becoming rarer every year, the ability for the next generation of lawyers to watch and learn how to create case-winning opening and closing statements is becoming more difficult.

Opening statements present an attorney the opportunity to make a "compelling" first impression, create a roadmap of the evidence for the jury, and weave in persuasive arguments to mitigate the juror's "crystalized" reptilian views. In addition, we believe that the best opening statements will educate the jury about the complex legal and factual issues without delving too deep into the science. Furthermore, it will assist the jury in navigating Plaintiff's "distractions" from what the case is *really about*. It is critical, however, when you construct your opening statement that you go on the offensive, do not overpromise, and be comfortable with your content.

Closing statements – while equally important – provide an attorney the flexibility and freedom to argue the merits of the evidence. But, to do this effectively, you must help the jury navigate Plaintiff's "spin" on the evidence while staying true to your theme of the case. And, you must offer compelling arguments to convince the jury what the evidence "has or has not shown." We believe that every defense-minded attorney can tell a story, hook the jury, and employ intentional persuasive language to construct a winning closing statement. That said, the most important

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thing about the closing argument is that you look the jurors in their eyes and make it your own.

Opening Statements

At its core, an opening statement is a party's roadmap – outlining the factual evidence it will present to a jury throughout the trial. At this early stage, it is important to make a connection and build credibility with the jurors. In short, trust us – not them. You also want your opening to be clear and compelling, while avoiding potential pitfalls that could damage your credibility as the trial plays out. Below are practical tips, particularly for younger attorneys, to consider when preparing an opening statement.

One of the first things in building an opening statement is to identify and predict what issues, evidence, and themes that the plaintiff's counsel will focus on, in order to find a way to turn them on their head without coming across as too defensive.

Predicting these issues – especially for a first bellwether trial – is critical. Before the jury ever gets to hear from the defendant, they will have sat through plaintiff's lengthy and likely inflammatory opening statement. As the defendant, there can be the impulse to immediately address every single issue presented in plaintiff's opening statement. This is our instinct as lawyers. This approach, however, can leave you looking overly defensive by trying to "explain away" everything raised by the plaintiff. It also distracts from and dilutes the defendant's core themes – which the jury needs to understand right from the outset. On the other end of the spectrum, you can choose to wholly ignore the issues raised by plaintiff – focusing the defendant's opening instead only on your case and your themes. But this runs the risk of leaving the jury confused or, worse yet, giving the jurors the impression that what plaintiff said was accurate or believable. That, too, is not ideal.

We think the best opening statements strike a middle ground. This means being prepared to respond to plaintiff's key points at the outset without bogging yourself down in the details or leaving the impression that the defendants are flustered by plaintiff's presentation. Once you identify the likely distractions, prepare short rebuttals that are simple, easy to understand and dismissive. Sometimes, this means creating several of these as modules and seeing how plaintiff's opening statement comes into evidence. Make the jury feel they have not heard the full story from the plaintiff's counsel, which helps call into question their credibility before the presentation of evidence. This approach has the benefit of addressing plaintiff's themes right up front without losing focus on the key, affirmative elements of the defendant's case.

Many MDLs – particularly those involving pharmaceuticals or medical devices – are centered on alleged injuries

caused by the product in question. These alleged injuries can span the spectrum – from relatively innocuous to potentially life threatening. How to address the individual plaintiff in the opening obviously needs to take into account the specific issues of the case, the facts, and the alleged injury. That said, there is too often a reluctance by defendants to directly address the plaintiff in the opening (or on cross) for fear that it will appear they are "blaming the plaintiff." Being the defendant does not mean you only have to play defense. If the plaintiff has credibility issues, that should be addressed head on in the opening. If the plaintiff made choices or decisions that lead to the injury, focus the jury on personal accountability. And, if the plaintiff's lawsuit seems motivated by more than "justice," let the jury know that as well.

This, of course, does not mean you have to be disrespectful, demeaning or heavy-handed when addressing the individual plaintiff – nor should you. That could turn off the jury or leave the door open for the plaintiff's counsel to paint the defendant (and their counsel) as corporate bullies. But it also does not mean that you should be afraid in the opening to directly address the plaintiff in a factually accurate, sensitive and respectful way.

Bellwether trials are typically preceded by years of fact-intensive discovery. Millions of pages of documents produced. Hundreds of hours of deposition testimony given. And the attorneys involved – on both sides – are mired in every nuance of every issues, both great and small. The result is often a second litigation language – acronyms of important studies, shorthand for pieces of literature, descriptions of particular disease states or mechanisms of action, and so on and so forth. This becomes the scientific jargon of the litigation, with the attorneys able to rattle off big words and complicated scientific concepts without missing a beat. This might make for effective expert depositions, but not for opening statements. While the litigants and the court may be fully conversant in the language of the litigation, it will be one that is entirely foreign – and confusing – to jurors.

Trials are complicated in the best of circumstances, and attention spans are increasingly fleeting. In crafting an opening statement, you should work to simplify concepts with language that a jury will be able to process and comprehend. For example, instead of "pharmacovigilance" try using "drug safety." Replace "multi-year, randomized, Phase III clinical trial" with "medical study." A "myocardial infarction" should be a "heart attack." Avoid acronyms and technical abbreviations that, while perhaps commonly used in the litigation, will have no meaning to the jury. Many MDLs are steeped in complicated science – science that is often beneficial to the defendant's case. A compelling opening statement should be used to explain the science like a teacher to a student, not a scientist to another scientist.

Trial preparation is about being comprehensive – identifying every document you *might* use or witness you *might* call. But trials themselves are dynamic; particularly for the defendant who must adjust and respond to the plaintiff's case. As a result, evidence or testimony to which you were previously certain you would present to the jury may no longer be necessary or relevant. Those evidentiary decisions, unfortunately, come long after opening statements are given. And opening statements are, essentially, promises. Your promise to the jury about the evidence you will show. Your promise to the jury as to the testimony you will bring them. Your promise on what you will deliver. In drafting an opening statement, there is a tendency to want to preview every piece of compelling evidence – to put on your entire "best" case at the very beginning of trial. Be careful.

Overpromising at the outset opens you up to potentially damaging credibility issues at the close of trial. If there is a witness you *might* call, but are not certain of, there is no need to highlight them in opening. The same goes for documents or potential case themes. It is not a credible option to tell the jury in closing that you did not call a certain witness because the plaintiff tried a different case that you anticipated. You do not want to be forced to make a choice between 1) introducing evidence that is no longer relevant just to keep a promise from opening; or 2) not introducing that evidence only for the plaintiff's counsel to highlight that omission. If there is evidence – no matter how good – for which you are on the proverbial fence then it is best to leave it out of your opening.

More importantly, you can usually win a hand of cards with a full house and don't need a straight flush. It is important to make strategic considerations on what cards to hold back until cross-examination, to both catch witnesses by surprise and allow the jury to have a little more context for certain lines of testimony.

Finally, it is cliché, but the most important thing for any opening statement is for the lawyer to present the facts and evidence in the organization and style that is most comfortable for them. There is no absolute right or wrong way to do an opening, and each opening will be different depending on the facts of the case. Some lawyers like to open with a "power statement"—introducing their entire case in the first five to 10 minutes. Others like to do a warm-up that includes introductions and some preliminary set-up and seed planting. Whatever the structure is, the attorney giving the opening statement needs to feel comfortable with it.

Closing Arguments

As mentioned above, an opening statement is a party's roadmap outlining the factual evidence they will present to a jury throughout the trial. Thus, it follows that a closing argument is a party's summary of the merits of the evidence presented at trial that persuades the jury to adopt your theme of the case and to follow your closing instructions. Essentially, closing arguments provide you the opportunity to refocus the jury on the evidence that matters and what the evidence shows or does not show. Additionally, you are provided the opportunity to remind them about the key arguments and witnesses presented, and to convince them to embrace an interpretation favorable to your position.

Specifically, for young lawyers, it is important to be your authentic self, focus on your personal style and strengths, use simplistic words and phrases that convey your position, and avoid pitfalls that may make you appear disingenuous. Below are practical tips, particularly for younger lawyers, to consider when preparing a closing argument.

Whether a closing attorney keeps an outline, takes exhaustive notes, or creates flow charts, the construction of the closing argument at trial is very fluid up until the point of delivery. At trial, there exist many "ebbs and flows" of wins and losses – i.e., an attorney may forget to offer key exhibits into evidence and forget key questions on direct and cross examinations, the judge may keep out or allow impactful exhibits and/or key testimony, and witnesses may "flip flop" or even forget key testimony. In other words, the evidence that you anticipate presenting during your closing argument may not be available.

In preparation for the likelihood of this event, we recommend keeping a flow chart that tracks the evidence – such as available exhibits that come in during trial, key witness testimony, and opposing arguments that support the themes of opposing counsel. Taking this approach will allow you to make impactful and strategic decisions on the content of your closing arguments that best support your theme of the case. Therefore, undoubtedly, tracking the evidence throughout the course of the trial is the key to delivering an impactful, thorough, and winning closing argument.

In 1995, in his now-famous closing statement, lead counsel Johnnie L. Cochran stood before the jury and compelled them to keep in mind: "If it doesn't fit, you must acquit." Mr. Cochran's "catchy" hook provided a metaphor that effectively bolstered the theme of his case and summarized the evidence in the most simplistic form to the jury. Understandably, the thought of this concept can be frightening for attorneys – specifically for the fear of coming off as "cheesy" in front of the jurors. Nonetheless, if you can conquer this fear, building a hook into your closing statement can provide a powerful metaphor that helps to add colorful and engaging context to the evidence.

Your hook should be used in a manner that adds persuasiveness and color to your closing argument. For starters, we suggest simple hooks, such as *"trust the evidence, not the attorneys."* But we offer this sound advice for young lawyers: be careful to avoid the temptation of being too "catchy." A hook must feel natural to the juror while stoking their attention. Word-to-the-wise: do not repeat the hook after every sentence in your closing argument. Indeed, you will come off as "cheesy" to your jurors and potentially damage your hard-earned credibility. Your hook must be strategically placed throughout your closing argument.

In MDLs – as is common in most cases, plaintiffs will muddy the waters with a "boat load" of evidence in the form of email snippets, documents, and deposition testimony – most taken out of context. We call this "spin." Plaintiff's theme – particularly involving products litigation – is to show that the case is *really about* money, lies, greed, and shiny defective products. Hopefully, by the time the jury is ready to hear closing arguments, the judge would have kept most of this (irrelevant) evidence out. But a smart attorney will have carefully tracked the evidence and will have prepared for the "spin."

The only thing that you can control at trial is how you present the facts and make persuasive arguments about how and why the evidence supports your theme. Do not get "bogged down" with what we have called "distractions" – i.e., distractions from what the case is really about. This is plaintiff's spin on the evidence. As you build your closing argument, here, insert hook: *"trust the evidence, not the attorneys"* coupled with the supporting evidence to briefly "smack down" the "spin" and quickly turn to the evidence that best supports your theme.

We recommend that you do not build into your closing argument an introduction like: *"Members of the jury, my name is (insert name), thank you for your service."* This is a mistake. Time is limited. Instead, begin your closing argument with a story or a hypothetical analogy. This is not as challenging as many may think. This is where you can be creative and use supporting evidence in graphs, charts, and the facts to tell a descriptive story to support your theme of the case. This approach will serve to break up the complex evidence into digestible nuggets for the jury. In addition, it will effectively connect and engage the jury because people like stories and hypotheticals. Now that you have their attention: *game, set, match.*

Now, you are ready to convey your theory of the case. Tell the jury in one or two sentences what the evidence has shown and how the pieces fit to support your side: *"Throughout this trial, the evidence has shown that (insert client) has brought to society an innovative product that at no time was defective but has changed the lives of millions of people just like you and me."* Be brief and concise. But be cognizant that this statement will serve as the roadmap for the rest of the closing argument.

As you construct this roadmap, go back to your tracking chart and parse out the elements of the law that plaintiff failed to prove. It is also critical to attack the promises that plaintiff's counsel made in the opening statement but failed to keep throughout the trial because of the lack of evidentiary support or weak expert testimony. This will undoubtedly create doubt in the mind of the jurors. It is equally important to highlight for the jury what the plaintiff's evidence has not shown in contrast to how the evidence has supported your theme throughout the trial. Be sure to weave in essential facts and unmet elements of plaintiff's burden of proof. Here (again), insert hook: *"trust the evidence, not the attorneys."* This approach will serve to shed a "light" on plaintiff's attorney's creditability before they have had a chance to present their closing arguments to the jury.

Closing arguments provide you the opportunity to refocus the jury on the evidence that matters and what the evidence shows or does not show.

Every word in your closing argument should be spoken with purpose. Each word should have an intentional impact on the jury. The construction of your closing argument should, thus, be crafted so that each word pulls at the *emotional fabric* of

the jury. So, it is not uncommon that your closing argument will go through many edits and revisions until the language is "right" and feels comfortable to you.

Intentional language is key. The importance of this cannot be overstated. For example, descriptive and emotional language should be intentionally used to tell your client's story; strategically repeating your hook will likely cause it to be remembered by the jury; intentionally using past tense and an active voice can add or subtract from the power of your theme; and finally, intentional use of the proper tone can add power to your argument or convey sympathy on behalf your client. That said, spend your time on words and phrases that align with your theme to "deliver the goods."

The style of the closing argument should be tailored to the facts of the case, the allegations against the client, and the jury's potential view of the parties. Nonetheless, the closing argument will require the attorney to employ the "art of persuasion" to convince the jury to render a verdict in favor of the client. The art of persuasion can come in different forms, *i.e.*, confidence, delivery style, an attorney's command of the facts and law, use of technology, and charisma.

Similar to opening statements – this too is cliché – that the most important thing for any closing argument is for the lawyer to know his/her own strengths and style to be persuasive in front of the jury. Some lawyers are great at memorizing speeches and incorporating powerful language. Others prefer to rely on notes, very few gestures, but to appear more relaxed. Whatever style you choose, avoid mimicking your mentor and make it your own.