

# IADC TRIAL SUPERSTARS PROGRAM

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## **KEYS TO EFFECTIVE DEFENSE OPENINGS AND CLOSINGS**

### **Introduction**

There are obviously numerous presentation strategies and tactics lawyers can and should use during the course of trial to garner the jury's trust, favor, and ultimately verdict. This presentation will focus on a few suggested strategies defense counsel can use in opening statement and closing argument, collectively demonstrated as a "Clopening." The clopening will also intentionally assess juror response to some universal themes and differing presentation styles.

Many trials, particularly ones steeped in scientific or technical evidence, will last weeks or even months; the evidence is often tedious and jurors become increasingly bored. Thus, trials can be as much a test of endurance as skill. Consistency, credibility and skill from voir dire through closing argument equally influence the jury. While openings and closings are alluring for the spotlight they provide a trial attorney, post-trial juror comments suggest these stages are not the primary opportunity to influence the jury. Civil jurors frequently report they did not weigh a counsel's argument, however compelling, in deciding the case, perhaps influenced by admonitions that an attorney's argument is not evidence. Openings & closings do, however, serve the important function of roadmapping and summing up the evidence and sequencing presented throughout a case. Moreover, while opening statements or closing arguments rarely win the case, the manner with which each is approached could very well lose the case. Jurors never hesitate to comment on negative impressions left by counsel during arguments.

## **Universal Presentation Strategies for Openings & Closings**

There are some universal truths regarding effective trial presentations that apply despite which side of the “v” your client assumes. Establishing a personal relationship with the jury from the outset is critical. The more tied to the digital world we become, the easier it is to forget the relational nature of a trial lawyer’s job. As discussed in more detail by Mr. Kenney, effective relationship-building communication balances both verbal and coordinating non-verbal communication. In fact, as Mr. Kenney alluded to, how you say it is often more important than what you say in the quest for jury rapport.

Personal credibility is perhaps the single strongest basis for a lawyer’s relationship with the jury. One of the biggest mistakes even seasoned attorneys make, which detrimentally affects credibility, is overselling when the actual evidence presentation under-delivers. Jurors recognize statements by the attorney about the expected evidence in Opening as a promise made and treat the promise as broken when the evidence does not meet the promised expectation. (Experienced trial attorneys will highlight any unfulfilled promises by their opponent). Voluntary recognition of difficult or bad facts is another recommended universal strategy that promotes credibility. Lastly, credibility is accorded attorneys who treat the Court, court personnel, opposing counsel and independent witnesses with respect. Though this should be intuitive, some attorneys ignore this simple credibility-building step. Basic courtesies such as showing opposing counsel each exhibit before publishing to the jury or witness and acknowledging opposing counsel and the client before Opening and Closing aid credibility.

Equally important for attorneys on both sides of the docket is an organized presentation structured around memorable themes. In this case presentation, some general themes to engage the jury are honesty in the doctor/patient relationship, personal responsibility, and the innate high risk in contact sports. These themes can be used to create a compelling story that draws in the jury. Moreover, the underlying issue of life-altering head or neck injuries in American football games is an issue currently receiving considerable current media and research attention. Consider how analogies to current event stories will aid or alienate your case and draw on them or exclude them accordingly.

### **Additional Presentation Strategies for the Personal Injury Defendant**

**Validate Sympathy:** Representing defendants in personal injury cases necessitates certain strategies to balance the plaintiffs' greatest advantage - sympathy. Validating rather than criticizing or warning against jurors' natural human tendency toward sympathy can be a more successful means of dealing with the proverbial elephant. Moreover, genuinely validating the sympathetic response by demonstrating it within oneself again aids the rapport building. In this mock case, the sympathy factor will be tremendous for a young man with a bright future killed in his prime, leaving a grieving family behind. Defense counsel should expressly give the jury permission to grieve this loss while emphasizing that sympathy is, under the law, not a factor in their duty to weigh the evidence.

**Be Interesting Without Being Dramatic:** The appeal to emotion and/or fairness discussed in Mr. Kenney's article as Pathos and Ethos generally plays better for a personal injury plaintiff than for a corporate defendant. Logos, an appeal to achieve the reasoned, logical result, is often the only decision motivator left to the defendant. Encouraging Logos, however, is

comparatively boring and uninspired. There is, therefore, the temptation to dramatize or sensationalize – rarely compatible with Logos. Over-dramatization typically results in decreased credibility (i.e. Shakespeare’s Macbeth: “full of sound and fury signifying nothing”). Instead, presenting the logical, credible facts in a non-sensationalized manner will encourage the jury to actively participate in puzzle solving. Jury consultants urge that perceiving the evidence in this manner allows the jury to believe they deduced the truth on their own and, therefore, binds them to that conclusion. In the mock case, the media coverage currently given to football head injuries can easily create an opportunity for over-dramatization. Similarly, sensationalizing the facts and intentions surrounding the student’s spearing can certainly backfire. Avoiding drama does not, however, mean leaving your personality at the door. Again, this is a relational endeavor requiring affinity as much as credibility.

**Effectively assume the burden of proof:** Regardless of where the law places the burden of proof and how the court instructs the jury on such, it is a rare case indeed where a defendant wins simply because the plaintiff has failed to meet the requisite burden of proof. More often for a defendant to win the jury will expect the defendant prove the negative to plaintiff’s case. Likewise, alternative theories (even if not affirmative defenses), put forward by a defendant to cast doubt on plaintiff’s theory, are expected to be proven more probable than not. Accordingly, effective counsel will simply accept this burden, at least impliedly, in argument. For instance, the jury will likely expect the University Defendant to prove the team doctor and coach shouldn’t have known about the hairline fracture as well as prove the prior fracture did not cause the fatal injury by proving spearing did.

**Establish and Maintain Credibility:** While the importance of establishing credibility with the jury for both sides has already been stated, it is worth re-emphasis for defense counsel.

Natural sympathy for the injured plaintiff, particularly against a corporate defendant, generally means jurors may overlook credibility concerns about plaintiff's counsel. In other words, the badly injured plaintiff will not be punished for the attorney's conduct; the same does not hold true for defense counsel. Credibility for defense counsel is, therefore, heightened. Credibility is most easily gained through accuracy, organization, and preparedness. Technical and/or scientific accuracy in all of your arguments, statements, and questions throughout the entire trial are crucial. Likewise, visible organization of files and presentation materials, and a demeanor of calm preparedness are necessary. Pre-established credibility is even more crucial when blame must be placed on the injured party without incurring the jury's wrath. The University has the unenviable task of attributing the cause of death to the deceased student and his parent. In a full trial, this issue would likely only be marginally addressed in Opening as counsel would certainly want time to develop credibility with the jury before delving into such a sensitive topic.

### **Juror Response to Themes and Stylistic Options**

This Opening presentation will allow some of the above recommended strategies to be tested with a mock jury. Additional issues are present in this fact pattern that can have application to other cases. We will intentionally interject some of these issues specifically to gauge the mock jury's response. One such issue could be the degree of jury sensitivity to blaming a deceased student and compared to blaming a surviving, grieving parent. Another interesting assessment may be the jury's reaction to analogies drawn between this case and the current headlines regarding targeting and concussive football injuries.

There are also stylistic preferences we have chosen to interject for the mock jury's consideration. By contrasting presentations with and without a multi-media format, we can assess the extent multi-media usage affects the jury's perception of counsel's credibility.

Likewise with contrasting presentation styles, we can learn whether covering verdict questions in a closing and soliciting specific responses per question helps to commit the jury.

### **Conclusion**

Many argue the basic premises of persuasion are: tell me and I will forget, show me and I will remember, but involve me and I will understand and act. The tactics addressed above help defense counsel attain an involved jury that will understand and act consistent with counsel's desire. Credibility affects a juror's willingness to become involved and is the essential first step. To move the jury past sympathy to reach a just result based on the facts, validate the jury's sympathetic response first. Finally, the story used to involve jurors must be interesting but not overly dramatic, acknowledge weaknesses, and accept the responsibility to establish the negative.