

TRIAL TECHNIQUES AND TACTICS

MARCH 2018

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We all struggle to structure effective openings and closings. This article encourages you to keep it simple, and fresh, by aiming your presentation at answering the most fundamental of questions: Why are we here?

Starting with *Why?*

ABOUT THE AUTHOR



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ABOUT THE COMMITTEE

The Trial Techniques and Tactics Committee promotes the development of trial skills and assists in the application of those skills to substantive areas of trial practice. Learn more about the Committee at www.iadclaw.org. To contribute a newsletter article, contact:



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The International Association of Defense Counsel serves a distinguished, invitation-only membership of corporate and insurance defense lawyers. The IADC dedicates itself to enhancing the development of skills, professionalism and camaraderie in the practice of law in order to serve and benefit the civil justice system, the legal profession, society and our members.

ADA MARIE! ADA MARIE!

*Said not a word till the day she turned three.
She bounced in her crib and looked all around,
Observing the world but not making a sound.*

*She learned how to climb and made her big break
With a trail of chaos left in her wake.
She ran through the day chasing each sound and
sight,
And didn't slow down till she conked out at night.*

*Her parents were frazzled—but tried not to
freak—
As Ada grew bigger and still did not speak.
Clearly, young Ada, with lots in her head,
Would have something to say when it ought to be
said.*

*That's just what happened when Ada turned
three.
She tore through the house on a fact-finding
spree
And climbed up the clock, just as high as she
could.*

*Her parents yelled,
"STOP!"
(as all good parents would).*

*Ada's chin quivered
But she did not cry
She took a deep breath
and she simply asked,
"Why?"*

*"Why does it tick and why does it tock?"
"Why don't we call it a granddaughter clock?"
"Why are there pointy things stuck to a rose?"
"Why are there hairs up inside of your nose?"*

*She started with Why? and then What? How?
And When?
By bedtime she came back to Why? once again.
She drifted to sleep as her dazed parents smiled
At the curious thoughts of their curious child,
Who wanted to know what the world was about*

*They kissed her and whispered, "You'll figure it
out."*

Andrea Beaty, *Ada Twist, Scientist*, 1-8 (Abrams Books for Young Readers, an imprint of Abrams 2016).

Where to begin an opening statement can be a difficult task. You have prepared your defense for years leading up to this point. Everyone in the courtroom just listened to a compelling and impassioned opening statement from Plaintiff's counsel. Now it is your turn. You can begin with "the rest of the story" but then you have to think about whether those few millennial jurors will know who Paul Harvey was and make the right connection. You can begin with "the other side of the coin", but then you think about whether there are jurors who have just lost it all betting on the latest cryptocurrency bubble. All of these methods have their place, however, in today's jury trials, there is a powerful and effective tool to shape your opening statement and ultimately persuade your jury. Begin as Ada Marie and start with *Why?*

Why? is the natural place to start

Pick up any article on how to give an effective opening statement and I'm willing to bet that somewhere in it the author suggests that an opening statement should tell a story. These articles may suggest that you begin your opening with a story. I agree.

Some people are natural storytellers. Gerry Spence, the famous trial lawyer was one of them and he once said "In our hearts we all love to hear and to tell a good story. Stories, well told, are the engines by which we win." Spence enjoyed tremendous success with his

stories. For those who need help developing the story of their opening statement, let me make this suggestion—start with *Why*?

Why is an adverb meaning “for what reason or purpose”. Like Ada Marie, we have been asking why since we were children. We seek explanations for phenomena. *Why?* questions are built on curiosity. As children curiosity is an effective engine of discovery. Psychologists have determined that through why questions children learn cause and effect. It becomes a game that we play to gain a better understanding of the world around us. This curiosity matures as we get older. Interestingly our fellow primates—chimpanzees—studies show, can be curious. But unlike human children, they do not seek explanations for causes of phenomena. Put simply, they do not ask *Why*?

The curiosity driven *Why?* is an effective tool for the trial lawyer throughout the life of a case. Arguably the best trial lawyers are the most intellectually curious. However, when it comes to an opening statement, the *Why?* is something different, or at least can be thought of in a non-traditional way.

In the defense opening statement of any case, you should provide the jury with a short, truthful, and memorable statement of “*Why we are here?*” Explaining this pivots the juror’s mind away from the what, how and when questions that were just answered by plaintiff’s counsel and instead focuses them on your client’s story. It is a simple place to start.

Why? is persuasive

Beyond its simplicity, *Why?* is persuasive.

Simon Sinek, author, motivational speaker, and consultant gave an interesting TED talk a few years ago. In it, he argues that successful leaders and successful companies separate themselves from their peers by beginning with *Why?* Using science and sociology, Sinek argues, “People don’t buy what you do, they buy why you do it.” He reasons that great leaders inspire others by putting the *Why* (the purpose) before the *How* (the process), or the *What* (the product).

Sinek uses the example of Apple. Their sales statements starts with their “*why*” – they design differently to push the boundary. Once you accept their *why*, you trust them to build anything for you – a computer, an MP3 player, phone, a watch. Other quality electronics companies known for one product (e.g. Dell computers) struggle to sell anything else, because they are only known for what they make not *why* they make it.

He continues and maintains that when a company articulates their *why* and we believe it, then we as consumers go above and beyond to include that company’s offerings in our lives. We embrace their beliefs, not because they are necessarily better, but because they represent values that are important to us. They make us feel like we belong and these organizations are the ones that create loyal fan bases, and brand ambassadors.

As defense trial lawyers we all want jurors to be ambassadors for our client. It is our job to give the jurors the tools that they need to fight for our client’s position during jury deliberations. Providing jurors with an understanding of your client’s *why?* can

translate from the corporate world into the jury box.

Sinek's argument finds its scientific roots in neuroscience. He notes that the most central parts of our brain control our behavior and that this is what people speak to when they answer *why*. This is where "gut reactions" come from. If you answer the *why*, you make a direct appeal to this part of the brain. Interestingly, the part of the brain that responds to *why* is the same part of the brain that the Reptile Theory focuses on. Thus, by answering *why?* in a defense opening statement, trial counsel can begin to defeat the reptile early in the trial.

Why? allows for theme development

Using *Why?* to establish the theme of your case is natural. When presenting the "why are we here?" question, many times the answer is your trial theory. If you are creative the answer can be your theme. How memorable the corresponding answer and theme will be is up to you and dictated by the facts.

Why? can help with bad facts

When crafting an opening statement, many times we have to deal with bad facts— inaccurate records, no records at all, or a corporate witness who caved during her deposition. But, by establishing for the jury that we are here because of (insert your answer to the *Why?*) you can provide a backdrop from which the bad facts can be presented. These bad facts may not seem so bad if the jury understands why they are really in court during this trial.

Why? allows you to personalize your client

Trying to convince your jury that your client is something more than the big-bad-defendant that was just portrayed for them by plaintiff's counsel is an art. When compared to a sympathetic plaintiff, often the defendant is seen as the villain. Using *why* provides defense trial counsel with a unique opportunity to humanize their client. If the jury knows that they are, for example, here because after years of training and study, Dr. Jones set out to perform a lifesaving operation that resulted in an unforeseeable outcome, the humanity of your defendant may be easier to show to the jury.

Why? and the law

The ability for defense trial lawyers to use the law to support their client's position is important. For example, the burden of proof is something that can be used to the defense's advantage. Often the *why* are we here question can be answered by pointing the jury back to the law. For example, "we are here, because under the law, a plaintiff must prove (insert elements) and the facts show that they cannot meet this burden of proof."

Why? in the end

Just like Ada Marie, questions of how, what and when all have their place in an opening statement. But she always came back to *Why?* When building a defense opening statement starting with *Why?* and returning to it at the end can insure that the jury is ready to receive the evidence in the right frame of mind. Defense counsel can appeal to the inner part of the brain where jurors are most likely to make decisions. By this, we can give jurors the tools they need to fight for our client in the jury room.

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