



5354 Etheldo Ave., Culver City, CA 90230
Phone: 310.391.9661 Fax: 310.390.9499
www.actofcommunication.com

In opening a case, grab the jurors' attention

By Douglas S. Lavine

June 29, 2009

On Oct. 10, 1938, Nazi Germany completed its occupation of Czechoslovakia, carrying out brutal pogroms in the process. On Oct. 16, Winston Churchill addressed the American people. An orator lacking his genius might have begun his speech by saying something like this:

"I am glad to have the opportunity to speak to you, the American people, tonight. As you know, Germany has completed its brutal annexation of Czechoslovakia. This grave development portends the possibility of a war in Europe."

Respectable. But compare these imaginary sentences with the opening lines that Churchill in fact delivered:

"I avail myself with relief of the opportunity of speaking to the people of the United States. I do not know how long such liberties will be allowed. The stations of uncensored expression are closing down; the lights are going out; but there is still time for those to whom freedom and Parliamentary government mean something, to consult together. Let me, then, speak in truth while time remains."

Read these words out loud. What sort of mental image does this conjure up for you? Whenever I read Churchill's words I find myself imagining that I am looking down, from space, watching as lights are turned off all over Europe, one nation after another. I then imagine that the entire continent has been plunged into pitch black. Churchill's words not only gain my attention, they create a strong visual image and then a sense of urgency. They make my heart race. No wonder that President Kennedy, when conferring honorary American citizenship on Churchill in April 1963, said: "In the dark days and darker nights when Britain stood alone — and most men save Englishmen despaired of England's life — he mobilized the English language and sent it into battle."

The difference between my imaginary opening and Churchill's actual opening is the difference between perhaps gaining the audience's attention and riveting listeners to their seats. In this column, I will discuss the importance of using your opening words effectively and persuasively in argument to gain the audience's unwavering attention.

A FIRST INDISPENSABLE STEP

Regardless of the justness of your cause, the power of your argument or the intensity of your preparation, if you are incapable of gaining your audience's attention — and keeping it — you will not have the opportunity to persuade.

You cannot persuade people who are not listening. In fact, if they blame their boredom on you, they may hold your client responsible. Generally, you will have a very short period of time — seconds, or minutes — to engage the audience in your forensic enterprise.

Obviously, different venues require different approaches. In a long trial, it may be less urgent to grab the audience's attention at the start. But in most legal arguments — appellate arguments, bail arguments, motions arguments — gaining the attention, and interest, of the audience is critically important.

A strong, accurate and interesting opening that clearly states the theme of your case is a good way to grab the attention of the audience, whether composed of laypeople or judges. With a bit of concentrated effort and imagination, the creative advocate can usually find an appealing — even universal — theme even in the most mundane of cases. In my experience, opening salvos that frame an issue in concrete and accessible ways are quite effective. So is the use

of language that appeals to the heart as well as the mind — including metaphors that resonate with the audience in a visceral way, or language, like Churchill's, that summons up strong visual images.

Let me use the following simple, contrived scenario as an example.

Suppose your client, Mary Smith, claims that the police used excessive force in arresting her after she left a party on Christmas Eve. She concedes she was driving while intoxicated, but claims that she was unnecessarily brutalized by the arresting officer.

Now, before reading on, how would you envision the beginning of your opening statement to the jury? What appealing themes do you see buried within this scenario?

Lawyer A sees no creative opportunities at all and argues that this is a case in which the evidence will show that her client, Mary Smith, was roughed up by a police officer after being arrested on Christmas Eve. Listen carefully to the evidence, Lawyer A states, and I am sure it will support my client's view of the case.

Lawyer B has been told by colleagues that this is a routine case, but Lawyer B understands that no case is routine to the client. Lawyer B has thought the case through and has tried to identify an accurate, persuasive and dramatic way of starting the opening argument. Lawyer B has tried out various potential openings on his colleagues, friends and family members. Lawyer B begins his opening statement with something like this:

"Ladies and gentlemen, the evidence in this case will show that my client had too much to drink on Christmas Eve and that she was rightly pulled over and arrested for driving while intoxicated. But what happened to her next should never happen to her or to any citizen. The evidence will show that the very people who should have been protecting the public turned around and abused the very public they were sworn to protect. This case is not only about the beating my client received; it is about the betrayal of trust that occurred that day."

Lawyer B has, first of all, conceded a key problem in the case — that his client was intoxicated. This concession removes much of the sting of this unalterable fact from the case. Lawyer B has also articulated not only the particulars of the case but has identified a universal theme. The particular theme — what the case is about — is the claimed beating of Mary Jones. But that has been anchored to the universal theme relating to the abuse of power. The jury has, at the very start of the case, been presented with a compelling context within which to view the evidence as it comes in.

UNIVERSAL THEMES

Years ago, I was a reporter — including for this very publication. I developed an abiding belief that embedded somewhere in the midst of the most mundane scenario can be found something compelling, something universal, something that speaks to people on a deep level. It is the job of the creative lawyer to find that gem.

My point is not that Lawyer B's argument above is the best that can be devised. My point is that, even in mundane cases, lawyers should maximize their opportunities to persuade by creatively structuring their opening arguments so that they combine specific facts with universal themes.

Gaining the audience's attention from the first words you utter is a key skill of effective advocates. Anchoring your case to universal themes is an effective way of keeping your audience's attention once you have gotten it.

Douglas S. Lavine is a judge on the Connecticut Appellate Court. He is the author of Cardinal Rules of Advocacy (National Institute for Trial Advocacy 2002) and Questions From the Bench (American Bar Association Section of Litigation 2004).