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Please send any comments, questions or ideas to editor@tsongas.com

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PRACTICE TIPS

Starting Your Opening with the Silver Bullet

Our April 2004 Newsletter article, “*The Case Story and Juror Reasoning*,” explained why composing your opening in the form of a story is so important. We have long recommended condensing that story to a single, high impact paragraph we call a “Silver Bullet.” Using the Silver Bullet to preface your opening is the best technique for controlling how jurors assemble the facts of the entire case into a story. A Silver Bullet gives the jury a roadmap for the information rich content of the opening. By knowing where the story is headed, they can concentrate on retaining your key facts and arraying them in the best possible way to support your client’s position.

The goal of the Silver Bullet is to:

- Introduce your version of the story
- Reframe the opposition’s story
- Provide the “big picture”
- Provide a roadmap from start to finish
- Satisfy initial juror curiosity
- Answer jurors’ initial questions

The goal of the Silver Bullet is not to:

- Respond to the opposition’s story
- Tell your entire story
- Lay out all your evidence
- Introduce all the witnesses
- Provide specific details
- Explain the law

The best vehicle for writing a Silver Bullet is to outline a 10-point story, or the 10 chapter headings that chronologically tell your story from start to finish, then turn each point into a one sentence explanation of that point. Sound daunting? That’s what many of our clients say. In our strategy sessions, we often hear attorneys

say, “My case can not be condensed into one paragraph. It’s just too complex.” To prove our point, we endeavored the “daunting” task of writing a 10-point story and Silver Bullet of the history of the United States. We figured if we could do this, then you can write a Silver Bullet for any case you try.



The History of the United States: A 10-Point Story:

1. The spectacular array of native cultures
2. The establishment of colonies
3. The revolutionary movement to independence
4. A new kind of democracy
5. The westward expansion and ensuing conflicts
6. The union victory, industrial expansion and war
7. The great depression and the New Deal solution
8. World War II and the postwar American engine
9. Decades of change
10. Forging into the new millennium with courage, commitment, and innovation

(Silver Bullet of this 10-Point Story Continued on Page 3)

VOICE OF EXPERIENCE

Debunking a Common Myth: Jurors DO NOT Make Up Their Minds After Opening

A common myth in the legal community is that jurors make up their minds about a case at the end of opening statements. The origin of this myth can be traced largely to a misreading of the 1966 University of Chicago jury study by Kalven and Zeisel, *The American Jury*. Highlighting the perils of “often cited but seldom read,” several scholars have cited Kalven and Zeisel’s work as finding that only about 20% of jurors change their mind after opening statements; for the rest, the judgments formed immediately after opening statements persist through the start of deliberations. However, this conclusion has been discounted, even by Zeisel himself. Recounting a conversation with a federal judge who asked him about this conclusion concerning the importance of opening statements, Zeisel answered “that this sounded both interesting and important, but we certainly had made no such discovery... We never even asked the question. Nowhere in *The American Jury*’s 438 pages can one even find the words ‘opening statement.’” In fact, what Kalven and Zeisel actually found (*inter alia*) was that for approximately 90% of the juries that were interviewed after reaching a verdict, the juries’ first ballot foretold the final verdict. The real conclusion

to draw from this is that by the time the first vote is taken (whenever that may be), the jury has generally settled on their decision. This by no means suggests that minds are made up after opening statement.

This is not to say the importance ascribed by many to opening statements is unfounded. Opening statements provide a thematic framework that jurors can

The real conclusion to draw from this is that by the time the first vote is taken (whenever that may be), the jury has generally settled on their decision.

use to organize subsequent information. If jurors adopt your framework instead of that of your adversary, you are halfway home. The “battle of frameworks” is an early and important battle to win.

So when *do* jurors make up their minds? It depends on the juror. Jurors begin to favor one side over the other at different phases of trial. Some jurors may walk in the door

with a bias toward the plaintiff or defendant, and the direction of this bias can be different for the same juror depending on the type of case. Other jurors strive to be open-minded, and do their best to refrain from leaning until all the evidence has been heard, and a few even go well into deliberations completely undecided. The rest of the jurors make up their minds somewhere in between. In addition, it is not uncommon for jurors to waiver or change their minds – some more than once – during the course of a trial. When we interview jurors, they often say, “I was initially leaning toward the plaintiff, but after the defense put on their key witness, I started to rethink my position.” Cross-examination can play a vital role in changing opinions about a particular witness, and may cause a party line shift. Jurors also do not necessarily vote the party line. As an example, we often say, “The juror who is good for liability will be bad for damages.”

The moral of the story is that opening statements, while critically important, do not win or lose a case. However, by winning the battle of the frameworks, you give yourself a competitive advantage in the rest of the trial, leaving your opponent with an uphill fight.

The History of the United States: A Silver Bullet

The North American continent was home to a spectacular array of native cultures before European settlers established colonies along the eastern seaboard. A hundred years of taxing English rule galvanized a broad-based revolutionary movement that resulted in the Declaration of Independence on July 4, 1776, and the successful American Revolution. The newly created United States of America marshaled some of the greatest political philosophers in history to create a new kind of democracy that was able to weather significant early challenges. Fueled by a sense of destiny and undaunted courage, the young nation bargained and fought to control the stunning lands and resources from the Atlantic to the Pacific Oceans. Deep divisions over slavery and politics resulted in the bloodiest war the country ever saw. The Union victory ushered in a period of enormous industrial expansion that survived economic uncertainty, political upheaval, and World War I before running headlong into the jaws of the Great Depression. Relentless economic stagnation was eased by new federal government programs, but it was not swept away until World War II restarted the American industrial engine. The remarkable human sacrifice and ingenuity that won that war set the stage for an unprecedented period of technological innovation and economic growth. Issues raised by people of color, women, the anti-war movement, environmentalists, anti-tax activists, and an increasingly urbanized society had deeply divided the country by the dawn of the 21st Century. The destruction of the World Trade Center in New York on September 11, 2001 by Muslim extremists signaled the beginning of a perilous new chapter in the American saga. Its successful conclusion demands the same qualities of courage, commitment, and innovation that have marked the nation's history to date.

GRAPHICS UPDATE

Frequently Asked Questions About Graphics

Aren't graphics expensive?

Good visuals can be used in every phase of litigation: to help illustrate your arguments, brief or motions; to clarify your case strengths for the mediator; and/or to send a message to the opposition that you are serious and ready for trial. A single visual that clearly explains your case may save your client money by assisting in settlement, persuasively arguing for summary judgment, or arming jurors with the tools to advocate your side of the case during deliberation. The cost of graphics is a fraction of the expenditures made on the road to trial, and pales in comparison to the benefit of using them.

Won't jurors think I look too "slick" if I use graphics?

Graphics help explain your case to the jurors, which makes you look more professional and your client look more credible. Demonstratives that communicate the message, no matter how "slick," have a significant, positive impact on the perception of the attorney and his/her case. In all of our mock trial testing and post-verdict interviewing, we have not heard a single juror criticize the "slickness" of a chart that presented the information in a way that helped jurors understand the case. In fact, we have learned just the opposite – jurors have become accustomed to, and expect, the types of graphics that are seen in *USA Today*, on

CNN, and on local news programs, which are often more "high-tech" than any visual aids you will use at trial.

Why not just write on a flip chart?

In a study done by the Demonstrative Exhibit Specialists Association conducted at DOAR in New York, presenters who used the typical black and white blow-up were shown to run the risk of lower perceptions of credibility. Studies show that color visuals are twice as persuasive as visuals in black and white. While the interactive effect from using a flip chart can be beneficial, if the information you're writing on the flip chart is critical to the case, time and care should be taken to present it in away that is graphically memorable.

Can't my witnesses just present the evidence?

Witnesses are vital to getting your story across, however, after three days only 10% of information delivered verbally is retained; while only 20% of visual information is retained. However, when both the visual and verbal mediums are used, jurors retain 65% of that information after three days. Thus telling and showing jurors your case is six times as effective as simply telling your case to the jury through witness testimony.

My expert made a lot of charts, shouldn't I just use those?

Often the charts in expert reports, while factual and informative, lack the persuasive appeal necessary to move the layperson in the desired direction. Most expert charts are either in black and white (which are not as effective as color) or more importantly, do not communicate a simple, coherent message to the jury. Rather, expert charts do what they are supposed to do – chart complex information. Expert charts should be used as the foundation for graphically designed demonstrative exhibits that effectively communicate the expert's conclusions in a way that can be understood and retained by the jury.

I've never used Tsongas for graphics before, why should I start now?

Many attorneys rely on their assistants and paralegals to create their demonstrative exhibits. While technology has enabled many people to create demonstrative exhibits, it is important that a person trained in persuasive communication and the principle of design play a role in the strategic conceptualization of any chart. Creating a persuasive graphic is more than simply entering text and data for charts in PowerPoint. A trained consultant and design team can ensure that your themes and trial strategy are effectively communicated in your demonstrative exhibits.