12

Getting Ready to Give and Take

The way to win in opening is to figure out how you could lose and make sure that doesn't happen. It comes down to three questions:

1. *What will they say in opening that'll hurt?*
2. *What's wrong with it?*
3. *What's the best way to expose those flaws?*

Winning the Inning

The starting point of this part of the system may sound obvious, but some attorneys overlook it until it is too late. You have to remember: there is no rebuttal in opening. View opening through the lens of the *end* of opening, when both sides are finished speaking, and make sure you're still ahead after they have taken their best shot. On the plaintiff's side seeking money damages, playing catch-up is playing with fire. You'd better come out ahead and keep running as if justice were hanging in the balance, because it is.

I tell people, "It's not time yet to pat yourself on the back when you sit down after delivering the plaintiff's opening statement. That is not good enough. Good enough is when you can pat yourself on the back after the other side sits down, having delivered *their* opening."

The old adage, "There is no second chance to make a first impression," is particularly true in trials in which you are seeking monetary recovery for your clients' injuries. Jurors are skeptical of such claims. We cannot afford to let the defense paint our case as shady. Once that pall is cast it is extremely hard for you to shine the light of truth.

Anyone who has experienced the defense counsel being the first one to point out in opening that your medical expert admits X-rays taken in the ER prove your client had degenerative disc disease *before* the crash, but were otherwise normal, showing no sudden traumatic injury on the X-rays, knows what I am talking about.

Jurors look sideways at you with a glance that says, "When were you planning to tell me about *that*? You had me going. I thought you might actually have a legitimate case. I should have known better!"

And all you can do is try to comfort yourself by thinking, "I cannot wait for my doctor to get here and makes the defense look bad by explaining that fifty-year-olds almost *always* have degenerative disc disease; it is nothing more than the normal aging process. And an X-ray will *not* show a herniated disc, like my client had; it will only show broken bones! No one says my client broke her neck!"

You can try to make yourself feel better looking forward to that moment of clarity in the future, but the fact is, by then, it will probably be too late.

Most jury studies report that jurors make up their minds somewhere between the end of opening and the end of the first witness's testimony. We don't have the luxury of setting the record straight later; the time to set it right is opening. You must anticipate and inoculate on the front end.

This point was driven home for me when I was doing a mock trial with a lawyer in our office, involving a car crash. There was

a claim that our client's injuries preexisted the crash in question. The purpose of the exercise was to prepare for trial and to make this very point. I told my trial partner to make a list of bad facts (if we were to lose the case, it would probably be due to at least one of these facts) and to make sure to deal with them in his opening. I played the part of the defense counsel. He dealt with most of the main defense points we anticipated, such as the ER X-ray showing degenerative disc disease, otherwise being normal, along with another crash and some limited treatment ten years ago that resolved. However, he left out a negative nerve-conduction study. I made a big deal out of it in my mock defense opening: "They claim he has a nerve injury from a herniated disc, but the nerve injury test that was done showed no problem; it was perfectly normal!"

Right after I finished the defense opening and we left the room, my colleague wanted to go back in and tell the mock jurors one more thing so they didn't get sidetracked in their deliberations. I asked if I had misstated the facts (I had just learned about the case the evening before, so there was a good chance of a factual error). He said there was no misstatement. He just wanted to add an explanation about the negative nerve-conduction test so things weren't taken out of context. I told him, no way, that the point of the exercise was to bulletproof your case in opening; if the real jury was here there would be no do-overs.

After getting a bad result from that focus group, we did it again with the next group. This time the lawyer for the plaintiff's side covered all the bases, including the nerve test. He explained that the defense was taking the nerve-conduction test out of context. It is a hit or miss test that will only test positive if the nerve is being pinched at the moment the test is done. It was done only one time in the two years since the crash, and our client's nerve symptoms were *not* nonstop; they come and go. More importantly, when the surgeon operated, he saw with his own eyes that the nerve was compressed and it got better after he surgically fixed it. Using the strong, nonapologetic method of *in context versus out of context*, which we will cover in chapter 14, the result changed from bad to good. Better to learn the lesson in a mock courtroom than in a real one. The aim of this book is to create a safe learning haven for you too.

Scouting for Defense Strategies

Before you can effectively bulletproof your case from the defendant's favorite facts, you must first identify them. Leading up to trial, keep your antennas up at all times, never burying your head in the comforting sand of the strengths of your case. Look out for pitfalls so you can plot a course accordingly.

The starting point of this part of the system involves stepping into the defense counsel's shoes and thinking about all the things you would do in opening to win. Start preparing a list of their favorite facts from the beginning of discovery. After every deposition, every hearing, every conversation with the opposing counsel, keep a file with notes about all of the ways they may try to undermine your case in opening.

They will ask about treatment for back pain in the past, signaling a defense of preexisting problems. They will ask about why your client didn't go to the doctor during certain periods, signaling a gap-in-treatment defense. They will ask about medical records indicating improvement, signaling they will be highlighting them in opening. They will ask about strenuous activities in the past, such as bricklaying, signaling a plan to blame the plaintiff's problems on things other than the crash.

It's not just about trial. The sooner you can figure out what the defense is up to, the better you can protect your case. The more informed you are of the other side's intentions, the better equipped you will be to keep your clients out of harm's way in deposition or interrogatories answers. The more you uncover about the defenses early on, the better chance you have of preparing your experts and treating doctors so they don't get ambushed in depositions or at trial.

Every time the defense lawyers open their mouths is an opportunity to discover their work product, to figure out how they plan to beat you. Listen closely and they will reveal exactly where they are going.

Defense depositions are notoriously filled with boring, rote questions about irrelevant things. Don't be lulled to sleep. Sooner or later they will tip their hand with questions that count. They will ask a question with a little too much detail to be generic. For

example, "Do you ever shake out wet jeans before you put them in the dryer?" You can bet the client's washer and dryer are in the garage and one day the garage door was open while a van with tinted glass was parked across the street filming. "Did you ever live in Tulsa?" means the defense counsel have some records from Tulsa that may hurt.

When pretrial statements are filed, general reference to a stack of documents received from third-party requests may reveal a trap. Buried in there may be an office note that says the patient has had back pain for the last ten years, when your case is built around the fact your client's old back injury resolved five years before the crash in question. If you know about it, you can deal with it. If not, it could be devastating. Perhaps the same doctor wrote a note on the next visit clarifying that the injury was ten years ago, but the patient had been doing well for the last several years.

The more attentive you are, the better prepared you will be to take away their best shots. Imagine the sick feeling you will have after the defense counsel pulls out a blowup of the one note that said your client had back problems for the last ten years and shows it to the jury for the first time after you just told them your client got better after that old incident and you didn't mention this damning note. You'd look like a shyster and be frustrated by the defense's deceptive use of the note. Contrast that miserable feeling with the satisfaction you would feel if, at the end of your half of opening, you warned the jury what was coming from the defense. Then, you put the note in context by showing the jury the *next* note that makes it clear that those records, when viewed as a whole, actually support your client's testimony.

Once you truly understand what the defense plans to do, then you can start to construct a plan for victory: a global strategy that doesn't just incorporate the defense, but swallows it whole.

One important caveat is to not get sucked into trying their case just because you have spent a lot of time dissecting it before trial. Always return to your strengths, making sure your good facts are front and center. There is a big difference between deconstructing their case and trying their case for them. The secret is to weave countermeasures into your story, but don't let them overpower it.

The way to do this is grounded in a three-step process that taps into the true power of opening statements:

1. Eliminate their favorite facts (when you can).

2. Own their favorite facts (if you cannot eliminate them).

3. Put their favorite facts in context (if you cannot do 1 or 2).

I will cover the *eliminating* step here. I will cover the *owning* and *in context* steps in chapter 13, "Owning Their Favorite Facts," and chapter 14, "In Context versus Out of Context." We'll round out this section on opening statements with ways to supercharge the three steps. To me, these are some of the most fascinating and fun parts of the system. They involve the use of powerful, perfect words and phrases and framing winning question as essential instruments of justice.

Eliminate Their Favorite Facts

This first step involves cutting out as many bad facts as you can by dropping unnecessary claims, then moving *in limine* to exclude mention of them. If your clients had a rocky marriage, drop the consortium claim to avoid airing dirty laundry. If they have no tax returns, drop the wage loss claim rather than have them come off as tax dodgers. If your client has a long history of lower back problems but a healthy neck before the crash, then drop the lower back claim and pursue the neck injury. You can sink under all the dead weight, or you can cut loose everything but the essentials and swim to a fair and just verdict.

Before moving on to the next steps of what to do about defense facts you cannot eliminate, I want to share an epic story of a medical malpractice case I tried three times, covering nine years. This case was the genesis of this system of using opening as a way to sweep away all of the debris the defense counsel will scatter in your path, without veering off the course to your destination.

The defense gave identical openings each time, while I kept refining mine. It was like conducting a controlled study on how

the plaintiff's opening and the defendant's opening work together as one watershed event.

The First Trial: Caught Off Guard

At the center of the case was a debate over whether the patient suffered a serious nerve injury from an IV while in the hospital. My client claimed there was a dramatic, painful event that the nurse was fully aware of but didn't properly respond to, and that he kept using the needle, resulting in life-altering harm. The nurse did not document the event, and the defense claimed my client was making the whole thing up. The defendant's opening was eye-opening for me. In my opinion, snippets of medical records were taken out of context, key entries from those same records were omitted entirely, and descriptions of testimony were diced and sliced so much that in some places I felt they barely resembled what witnesses had actually said in depositions. I was not prepared for such a twisted presentation by the defense in opening.

One example was that the initial office visit with a doctor after discharge from the hospital didn't mention certain findings at the site of the alleged injury that should have been present if the patient had been harmed in the hospital. That would have been smoking-gun evidence for the defense, except a follow-up visit recorded a history that the symptoms had been present from the first visit on. The doctor who made the entries explained that the symptoms were there on the first visit, he just didn't dictate them in his initial note. Given the doctor's testimony and the second note, I did not expect the defense would make an issue out of the incomplete first note, or at least would acknowledge the second note and the doctor's testimony about it. Therefore, I didn't cover that in my opening. I was wrong. The defense left the second note and the explanation out of their opening, while they featured the absence of findings in the initial note.

This was one of many such instances of what I felt was extreme *editing*; something I did not anticipate and did nothing in my opening to protect against. I was left to deal with the fallout during the presentation of evidence. We lost the case. Then the trial judge did something extraordinary: he granted a new trial based on manifest weight of the evidence. The ruling was upheld on appeal.

The Second Trial: Lesson Lost

The second trial took place in the midst of a particularly nasty and public tort reform battle. Doctors and their insurance companies were running ads showing fat-cat lawyers smoking cigars with piles of money on the table, while pregnant women couldn't get their babies delivered. It was not a good time to be trying a medical negligence case. It took a long time to comb through bias in jury selection, and even then, the likelihood of a tainted jury remained high.

I was more focused on dealing with bias barrage than opening. My jury selection system was still a work in progress at the time. I was distracted from an important lesson to be learned about opening statements. The lesson I should have learned was that trying to use the patchwork process of the evidence phase to undo damage done in opening doesn't work very well.

I did a better job this go-around of setting the record straight in opening, such as covering the situation with the initial note, but I did not do it globally, nor systematically; there just seemed to be too many distortions to cover all of them in opening. Part of the problem was time limits and the other was the lack of a system that allowed me to put so much of the defense's opening in context. I did not want to sound like I was trying their case by spending twenty minutes setting the record straight. Besides, more than a year had passed since the first trial, given the appeal, and the searing feelings I had while hearing their opening had faded.

After making a few adjustments, I gave what I thought to be a powerful opening and sat down quite pleased with myself. My self-congratulation was short-lived. Once again, I was seething about their tactics. Once again, the defense plucked statements out of context and paraded them around the courtroom without mentioning things that I felt needed to be included for any fair assessment. Things like showing a dictated medical record that made it sound like my client did not have symptoms consistent with a nerve injury caused by a leaking IV, when the doctor made a handwritten note the same day that tended to confirm the injury, not rule it out. This was a different doctor and a different note than the other record I did address as being shown piecemeal. Once again,

I was left trying to clean up the mess as the trial unfolded over two weeks. The difference this time was I was furious with myself for letting it happen again. The difference this time was we didn't lose; we got a hung jury.

It turned out there was a biased juror on the panel. During jury selection, this juror swore she had no feelings against medical malpractice cases and had not been influenced by the tort reform ads that were running. I later learned from another juror, who called me after the trial was over, that this lady announced during deliberations that, "it would be a cold day in hell before any tort lawyers got a dime." She told the other jurors, who were for us, that she had no plans for the weekend and to let her know when they were ready to vote no. After eleven hours of deliberation, she hung the jury.

The Third Trial: Lesson Learned

By the third trial, I was a man possessed and on a quest to dismantle any tactics that seemed to me to be smoke and mirrors. I knew the defense would do it again. I knew I had to do something about it. I knew there was so much to set straight that I could not just stand up and explain it all for twenty minutes without losing ground. I knew I needed a better way to call the defense out for taking things out of context. I needed something that was empowering, not apologizing. I needed something in the form of righteous indignation that would not cause a mistrial and would not be shot down for being too argumentative.

Lawyers that try cases with me get emails at all hours of the night laying out trial strategies, as I start the process of "thinking" a case after being tapped to help try it. I live in a rural area west of Orlando in a small town called Groveland. My trial partners joke, "Mitlock was in the Groveland Lab last night cooking up a storm." (My nickname is Mitlock, a play on the old TV lawyer's name, Matlock.)

Well, Mitlock went into the Groveland Lab on this one and closed the figurative doors. I made up my mind I would not come out until I'd invented deft countermeasures that I could weave into my opening without sounding defensive or appearing as if I was trying their case rather than mine. What came out of that process formed the foundation for many of the systems contained in this book.

The by product is what I call the in-context-versus-out-of-context model, which I'll lay out fully in chapter 14. It is a proud, strong, and permissible way to call the defense out for distorting the record. Setting the record straight becomes part of *your* presentation, not a diversion into *theirs*. After all, you are a guide for the truth.

The results were satisfying down to the marrow in my bones. Before the defense counsel could take snippets from the medical records out of context, I warned jurors about it, explaining how important it was that evidence be presented in context, not out of context. When the defense counsel gave his opening, by the looks on jurors' faces, it appeared they were thinking something along these lines: "That first lawyer warned us you would try to pull a stunt like this, and here we have it." After this marathon pursuit of justice, the third jury returned a seven-figure verdict.

Paring It Down

- Never lose sight of the fact you get no rebuttal in opening.
- Anticipate their opening and take away the parts that will hurt if you leave them to fester.
- Start figuring out early what the defense will say in opening.
- Listen to what they do and say in discovery—they will give away their strategy.
- Ask yourself these three questions:
  1. What will they say in opening that will hurt?
  2. What's wrong with it?
  3. What's the best way to expose those flaws?
- Then apply the three-step opening system:
  1. Eliminate their favorite facts (when you can).
  2. Own their favorite facts (if you cannot eliminate them).
  3. Put their favorite facts in context (if you cannot do 1 or 2).