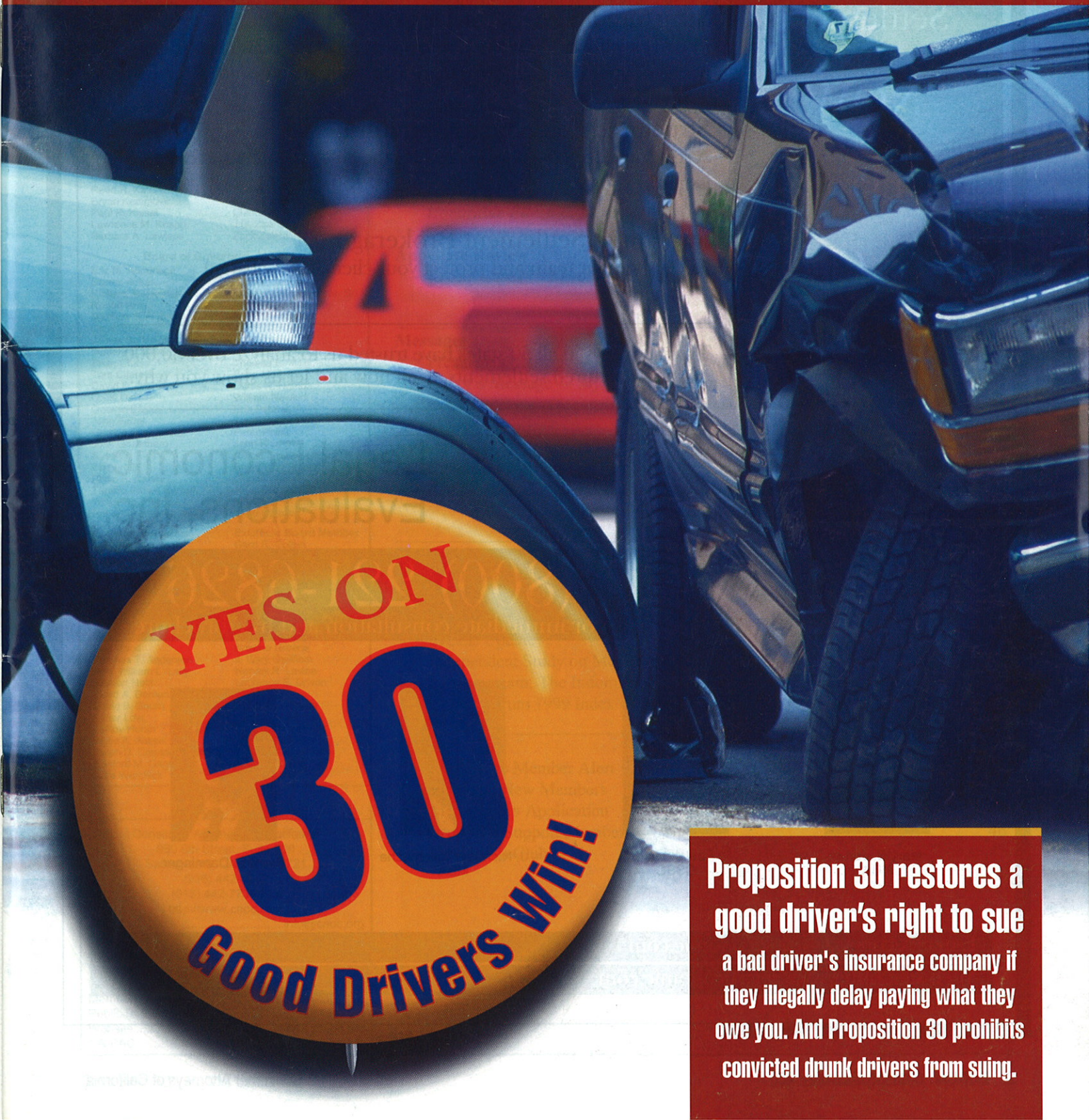


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Proposition 30 restores a good driver's right to sue a bad driver's insurance company if they illegally delay paying what they owe you. And Proposition 30 prohibits convicted drunk drivers from suing.

Opening Statement

By Brian J. Panish



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Opening statement is perhaps the most important phase of trial and the first opportunity for a lawyer to appeal to the jury's sense of right and wrong. The plaintiff's attorney must take advantage of this opportunity to tell the jury the story of his client. The lawyer presenting the case must be a storyteller. That is what the art of advocacy is, telling the true story of the case.

Purpose of the Opening Statement

The opening statement should be used to accomplish four basic purposes. First, you should educate and inform the jury about the jury system and your case. Second, you should use the opening statement to build rapport and credibility with the jurors. As plaintiff's counsel, you must deliver a credible message. If you are not believed, you cannot expect the jury to believe in your client's case and award just compensation.

Third, you must motivate the jury to return a favorable verdict on behalf of your client. You must explain clearly why your client has been wronged and should be compensated. The jurors must believe that you are presenting a justified case in which they should return a favorable verdict. You should use the opening statement to appeal to the jurors' sense of right and wrong and fairness.

Finally, you must set up your themes for your final argument. You must weave these themes throughout the entire trial. The process starts in voir dire and includes not only the opening statement but direct and cross-examination of witnesses and final argument.

While giving your opening statement, the story should be told through the use of the senses. All people learn through their five senses. When you are reaching more

than one of the senses, you are beginning to persuade. Try to make eye contact with each juror as you begin to tell your story.

The Law

California Code of Civil Procedure § 607 provides the fundamental legal parameters for an opening statement. The Code provides that the plaintiff's attorney speaks first. The Code provides that the opening statement is more than a recitation of facts. It is a statement of the issues in the case and the facts which bear upon those issues.

The purpose of the opening statement was set forth in *Williams v. Goodman* (1963) 214 Cal.App.2d 856 [29 Cal.Rptr. 877], in which the court stated:

The purpose of an opening statement is to inform the jury in a general way of the nature of the action and defense, to advise them of the facts relied upon by the parties to make up this right of action or defense, to define the nature of the questions involved, and advise them of the issues to be tried and the facts intended to be proved, so as to enable them to better understand the case (Citation omitted.)

In your opening statement, you frame the issues which the jury must decide. Reviewing all pertinent jury instructions is usually helpful. Your opening statement should be framed around those issues. Some attorneys like to use the actual language in the jury instructions in the themes of the case.

Opening statements are not intended to be an argument of the case or to discuss the law of the case to the jury. However, the trial court has the discretion to permit an attorney in an opening statement to discuss certain aspects of the law which may be important in the case. In

DeArmas v. Dickerman (1952) 108 Cal.App.2d 548, 533, counsel was permitted during the opening statement to read excerpts from applicable statutes. Generally speaking, trial judges will not allow attorneys to read or discuss an area of law during the opening statement. If there are legal issues that you feel need to be discussed during the opening statement, it is usually helpful to ask the court to pre-instruct the jury on certain issues of law which you believe are important to the case. This can be accomplished before the trial begins by the use of a motion in limine.

Statements of an attorney's personal belief are not permitted in an opening statement or at any time during the trial and could constitute grounds for a mistrial. (*Hawk v. Superior Court* (1974) 142 Cal.App.3d 108, 119 [166 Cal.Rptr. 713].) Many times attorneys make statements like "I believe" or "you will agree with me" or "you will find as I believe this is a frivolous case," or similar statements. These statements are improper, and when used, the proper objection should be raised.

Themes

Themes are common to those that seek to persuade and to the general public. Every newspaper or television screen broadcasts or states themes used by today's advertisers. Short advertising messages identify products and make

them memorable and hopefully desirable. Companies spend large amounts of money on advertising and public relations campaigns.

In today's era of remote control digital TV every household potentially has hundreds of television stations. Each viewer's attention must be kept; otherwise, they will merely turn to one of the many other available stations. Keep this in mind when making your opening statement.

It is important to identify early in your opening statement the importance of your lawsuit. The jurors are looking for an explanation as to why they are in the courtroom taking away time from their own lives. Every legal television show has a title or theme telling the viewer about the segment they are about to see. The theme can deliver a similar message about what the jury will be listening to and what will be viewed over the days to come.

Each trial is not a grab bag of witnesses and exhibits put together in some unorganized fashion. Trials are carefully planned. They have a structure. They have a beginning, an end and an order. Each trial has an objective and a message. The

theme of the case must be a short statement of what the case is about from the advocate intending to persuade. It is the early impression that the advocate wants the jury to have and to remember. The theme must be stated simply and in a few seconds.

80% of jurors are decided at the end of the opening statement.

The opening statement to the jury is similar to the opening segment of a television show. Jurors mentally turn off or stay tuned. As you begin the opening statement you must have the attention of the audience.

The principle of primacy has been taught for years by social scientists. This doctrine states that people tend to believe most deeply that which they hear or learn first. Social scientists have always made the statement, "First impressions are lasting impressions." This clearly is important

in trials. As such, the early statement of the theme during the opening statement hopefully will be believed most deeply.

Studies have shown that following trial and deliberation most jurors voted the same way that they would have voted after the opening statement. A widely circulated finding from a University of Chicago study found 80% of jurors are decided at the end of the opening statement. In the opening statement the attorney brings home the theme and explains what the case is all about. Examples of themes that can be used are things such as, in a fraud case, calling it a "cheat" case or a "broken promise" case; in a breach of fiduciary duty case, calling it a "breach of trust" case; in a product liability case, calling it a "profits over safety" case.

When developing your themes for opening statement and the trial, it is important to use creative and sensory language. We learn with our senses. Appealing to more than one sense makes persuasion easier. Unless a juror is handicapped in the use of his or her senses, the juror's ability to touch, smell, taste, see and hear is more or less equal to yours. If



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you can enter through the sense, the listener can experience the story as if it were happening to them.

It is also important to weave damages themes with liability. While it is important to concentrate on liability in the opening statement, do not forget or ignore the damages issues in your case. However, you must leave some things to the imagination of the jurors.

Make your themes short and believable. Make them comfortable and fit the evidence. It certainly will not advance your case to make a statement about something that you cannot prove.

Make sure to weave your themes through your entire case. The themes should be driven home not only in the opening statement, but in the direct and cross-examination of witnesses and in the final argument.

Rehearse

An opening statement should be rehearsed until it flows smoothly and without notes. Unlike examination of witnesses, the opening statement allows direct communication between the trial lawyer and the jury and looking at notes is a distraction. Do not be afraid of rehearsing. An opening statement should be well thought out and prepared. No matter how many times you practice, if it is sincere it will not sound "rehearsed."

Some trial lawyers believe repeated practice and rehearsal of the opening statement is not necessary and you should rely on your skill and experience. This is a mistake. It is during practice that structure, content, flow and delivery are sharpened. Practice allows you to be more confident and comfortable with what you are saying. You should practice before partners, associates, staff and family or friends and solicit their comments.

Starting the Opening Statement

It is important to begin the opening statement by stressing to the jury how important your client's case is and how proud

Try not to use statements such as "this is not evidence," "the opening statement is not evidence," or "what the lawyers say is not evidence." You may immediately turn off some jurors who will think to themselves, "why should I listen if this is not evidence?"

Jury consultants have determined that sympathy is the lowest motivator conceivable, and it just doesn't work.

In the beginning of the opening statement make sure to provide a short statement of the facts. It is not important that the intricate details be discussed, but just an overall statement of what happened and why your client is there seeking justice.

Use of the Blackboard

I often find it helpful to use the blackboard to summarize the topics that I will discuss in my opening statement. This creates a visual overview of the trial for the jurors. It allows them to know what areas are to be discussed and provides some framework for them as they listen. It is also your opportunity to map out the battleground for the trial and keep the audience interested.

Educate and Inform

Once you have your introduction and brief statement of the facts, it is important to then get into more detail about the facts of the case. This is your opportunity to educate and inform the jury both on the facts of the case and the judicial process. Explain to them the various segments of the trial and how the evidence will be produced.

As you summarize the facts that you will prove, it is important to drive home your themes. During the opening statement, you should summarize the theme of your case early, in a sentence or two.

as honesty, fairness and competition, that are concepts with which jurors can easily identify.

While you are educating and informing the jurors, it is important that you cover all your weaknesses. The principle of primacy states that the jurors tend to believe that which they hear first. It is your opportunity to frame your weaknesses in the best possible light for your client.

Defendant's Contentions

The opening statement is a good opportunity to set forth the defenses which you anticipate and to explain how they will be dealt with during the course of the trial. Once again, you will have the opportunity to set forth the defendant's defenses in the language most favorable for your client. You are setting the stage before the opposition speaks.

Motivate the Jury

It is important to motivate the jury to return a favorable verdict. All jurors have a sense of right and wrong. They are looking for a reason why they should find in favor of your client. It is important that you carefully choose your language. Choice of language is important. Use words such as "collision" instead of "accident." Use descriptive language as you tell your client's story.

Damages

If the case is not bifurcated, damages are an important part of every case. Most of your time should be spent on liability during the opening statement. When describing damages, do not try to make any play for sympathy. Jury consultants have determined that sympathy is the lowest motivator conceivable, and it just doesn't work. The results are beginning to show. The well-recognized psychological principal describing why sympathy doesn't work is called "defensive attribution." Defensive attribution states that when people are faced with a scary situation that potentially could happen to them, they subconsciously construct reasons for the victim's fault. That way they

When jurors are focused on the defendant's conduct from the start, they get around to the victim's conduct only later, after they have already blamed the defendant. However, sympathy is a poor motivator. If the plaintiff's lawyer begins his opening statement by talking about the defendant, jurors will construct their understanding of the case in the context of the defendant's behavior, which is what plaintiffs want to do. Jurors develop stories about what happened and then, once the evidence is presented, look for the evidence that supports their version of the story. You have control over the jury's first impression of the case. If you focus the jury's attention on the defendant and keep it there, you limit the amount of time spent dealing with the plaintiff's conduct in making decisions. It is important to influence the decision-making process in a way that is helpful to the plaintiff. Direct the jury's attention to the defendant's conduct in the opening statement.

Ending: The Two-Minute Drill

I like to refer to the end of the opening statement as the two-minute drill. This is where you must end with a bang. Keep in mind the principle of recency, which requires ending on a high note. When you are ending your opening statement, you want to conclude with what you are going to prove. Once you have stated in a couple sentences what you will prove with the evidence, then tell the jury that you are going to ask for a verdict on behalf of the plaintiff at the end of the trial. If substantial damages are warranted, you should mention that in your opening statement.

Conclusion

The opening statement is one opportunity you have in a trial to directly address the jury. Their attention is focused on you. You must be aware how you are coming across to the jury. Qualities such as candor, sincerity and warmth are qualities that will be observed by the jury, as well as the less desirable qualities of nervousness, lack of preparation and arrogance. Remember the purpose of the opening statement. Preparation and rehearsal will help you deliver a persuasive opening statement. ■

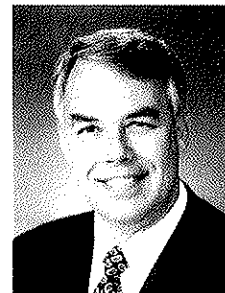
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