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***“Catch the Conscience!” — Scripting a
Winning Opening Statement***

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*I'll have grounds
More relative than this — the play's the thing
Wherein I'll catch the conscience of the King.
Hamlet, Act 2, Scene 2*

In *Hamlet*, the prince writes several lines about murder and adds them to the script of a play to “catch the conscience” of his Uncle, the King. Hamlet believes that Claudius will flinch when watching the play and hearing about the killing of a king, a tell-tale sign that Claudius murdered Hamlet’s father.

A dramatic play seeks to capture the audience, either with virtuous deeds or all-too recognizable human folly. The audience is drawn into the story because it identifies with the characters and the injustices foisted upon them. The playwright plots the arc of the play to best secure the audience’s immediate and sustained interest and participation in the story. Think of your opening statement as “a play within a play,”

with the jury as your audience. Script your opening to capture the jurors' conscience and make them care about the trial and the result.

The opening statement is your first and perhaps best opportunity to convince the jury that your client should win. The jurors know very little about the case, are anxious to get started, and give you their full attention. Their impression of you will probably be set by the time you finish your opening. Opening is the time to establish the jurors' expectations, start to develop a bond with them, and whet their appetite for your case.

Script an opening statement that takes advantage of the natural drama of this moment. Develop a theme that the jurors will care about. Start with a dramatic flourish, organize your points for maximum interest and persuasive effect, and focus on the facts that establish the human conflict and unfairness of the situation. Other than accounting for "bad facts," jettison discussion of evidence that does not directly support your theme or advance the conflict. Talk to the jury — do not diminish this critical opportunity with slavish use of notes or PowerPoint. And trust your own personal "performance" style. At the end of the trial, jurors will recall only a portion of what you seek to teach them. However, if your opening statement provides them with a clear theme and a compelling reason why your client should win, you will be well on your way to a successful result.

Develop Your Theme

Every play, and every case, requires a theme. In a trial, the theme synthesizes why the jury should care and why your client should win. The theme needs to be expressed simply and involve fundamental human emotions, failings or rights. Disloyalty and treachery abound in *Macbeth*; hubris, misperception and human frailty are on display in *King Lear*. Identify and explore your theme carefully. In a trade secret case, the theme will likely be theft and disloyalty; in a patent case, respecting one's property rights; and in a complex commercial dispute, the greed of an over-reaching plaintiff. Regardless of the theme you choose, it should be the lens through which you view every fact and theory. It will be raised in your *voir dire*, the center piece of the opening statement, and then built fact-by-fact during the trial.

When you start to craft your opening, identify your theme and keep it close at hand. Each fact and legal theory should be measured by and further that theme. If a fact amounts to detailed background or does

not directly advance the theme, do not mention it. By necessity, there will be background and surplus evidence presented during the trial. Such evidence is not needed — and distracts — in the opening statement.

Once you have selected your theme, revisit and refine it frequently. Motions *in limine* may affect key evidence that you were planning to highlight. Even more importantly, during *voir dire* you will learn about your jurors and their interests and proclivities. Review and revise your theme and factual presentation to appeal to the individual jurors' values.

Plotting the Arc of the Statement

The author of a great play plots the presentation of the story to capture the audience and provoke the desired reaction. Starting with a powerful and foreshadowing scene, the play immediately entangles the protagonist in a deep but personally-identifiable conflict, and then introduces complications and obstacles to resolution as he or she struggles to escape. The climax of the play is carefully planned to capture the audience's full attention before a speedy resolution. Strive for this same dramatic arc in your opening statement.

Most trial lawyers agree that an opening statement should not exceed 45 minutes, even in the most complicated cases. Lawyers who do not distill the key facts and themes deliver long openings. It takes work and attention to structure the opening. You have a good chance to keep the jury attentive and receptive during a crisp, well-organized 45-minute opening. If your opening is longer or if each part is not closely honed, you will likely lose the jury's attention.

Outline the points you want to cover in the opening, and then take a critical look at them. If you figure five minutes for your introduction, and five minutes for the ending, you have 35 minutes left. Divide this time into distinct sections of no more than seven to eight minutes each, or four to six segments. Rather than presenting a straight chronology, consider organizing the presentation by key facets of the case, such as the various stages of trial, the legal claims, two or three "scenes" of the key facts, and the two or three critical witnesses. Provide topic sentences as you move from one segment to the other. By making each of these sections short and distinct, you have a chance to refocus the jury on your developing theme every seven to eight minutes.

The Dramatic Prologue

Like any powerful play, an opening statement should start strongly and dramatically. Think how *Macbeth* opens with the foreboding “toil and trouble” of the Weird Sisters, or how the cast of *The Tempest* is literally blown around the stage during the opening shipwreck scene. The audience cannot turn away — every eye is on the performers. Yet 95% of opening statements start with the lawyer identifying him or herself, providing some background on the client, thanking the jury for their service, and other small talk. Jettison the clutter and unnecessary introductions. The first two minutes of the opening may be the most important moment of the trial. Why waste that opportunity — this singular moment of high drama — on introductions and thank-yous?

Walk to the front of the jury box, set your feet, and make eye contact with each juror. Take at least 10 seconds. Command center stage. THEN speak. Don’t introduce yourself or say hello. Have a two minute soliloquy memorized and ready to go. No notes, no documents, just you and the jury. Present the distillation of the most important facts, the theme of your case, and why your client should win. Perhaps start with your best analogy. Make the moment weighty and solemn — two minutes of high drama. Then pause, relax a bit, and offer whatever brief introductions and thank-yous may still be necessary. In the meantime, you have already presented the foundation of your case, imparting it to the jurors when they are most attentive and impressionable.

Conflict

Jurors need to care about your case. They need to see a wrong they can right. Fortunately, the conflict inherent in a trial presents a signal opportunity to capture the emotions and interest of the jury. Humans cannot help but react to and invest themselves in conflict, especially when they must ultimately resolve it. Think of the audience’s mounting suspense and even understanding of the horrors committed by *Macbeth*, especially because they result from his all-too-human and egotistical failings. The play’s conflict captures the audience; it cannot be put aside or ignored.

So too the presentation of the facts in a winning opening statement. Focus on the facts that present the conflict and advance your theme. Make the jurors see the start of the conflict and how the opposing party escalates it and seeks to unfairly turn the conflict or misunderstanding to its advantage. Emphasize the

alternatives available and the misguided choices taken by the other side leading to the ultimate dispute. Bring the conflict down to a personal, understandable level with which the jury will identify. Eliminate facts that do not advance your theme or demonstrate your conflict. Although you must anticipate and account for “bad facts” on which the other side will rely, if you can, build them into your conflict scenario as the client’s justifiable or understandable reactions to the other side’s bad acts. Use the case’s conflict to present segments of facts that capture the jurors’ attention and make them want justice for your client.

Performance

When Richard III’s horse is slain during the climatic battle with Richmond and Richard yells “a horse, a horse, my kingdom for a horse,” the audience knows his denouement is near. Think of the diminished effect if Richard delivered the line from upstage left, behind a post. Or if he read the line from the script or paraphrased it from bullet points on a screen while turning his back to the audience. Yet most lawyers deliver their opening statement while safely hiding behind a podium. Nearly all give the opening with notes or even the entire typed presentation clutched firmly in their hand. And who would dream of delivering an opening statement without a full PowerPoint? In the process, lawyers lose the drama of the opening and their ability to best connect with the jurors.

Unless required by the Court, do not use the podium in opening. Deliver the opening in front of the jury box, grabbing center stage. If possible, do not use any notes. Nothing should interfere with your discussion with the jurors. At a minimum, have your opening and closing segments fully memorized and rehearsed. If you must have some notes for the other 35 minutes of the opening, make them bullet points condensed to one or two pages which you can glance at if needed when you change topics. Without notes, there is always a risk that you might miss a point or two that you thought were important. However, that slight downside is greatly outweighed by the persuasive force you will gain by speaking in the moment, without notes, making constant eye contact with your audience.

Similarly, presenting your opening through a PowerPoint presentation misses the point of persuasive advocacy. There is no doubt that presenting the outline of your argument may free you from notes and make the presentation easier for you. However, the jurors’ eyes will be on the screen rather than you; if they do look at you, they will see your back as you reference the screen. You need to command the jury’s

attention through your heartfelt words, demeanor, body language and eye contact. Presenting your main points through slides forfeits that opportunity. Of course you will want to display the key demonstrative exhibits and charts. Walk to the screen and highlight the key provisions. Strategically intersperse demonstrative evidence to keep the arc of the opening moving and interesting. When you are done demonstrating the significance of an exhibit, turn the projector off. Bring the jurors' eyes back to you. Tell them why the document advances or demonstrates the conflict.

Although an entire trial cannot be scripted and committed to memory, most of the opening statement can be. No one will ever know your case as well as you. Have the confidence that you will deliver your best opening mostly from memory while standing in front of the jury and commanding their attention.

Style and Language

Of all Shakespeare's characters, Richard III may be the deepest and most complex. A brutal serial murderer, he also is a contemplative philosopher who understands and is tortured by his own crimes. He rises to great power despite a prominent disability. This complexity leads actors to numerous interpretations and differing methods to play and develop Richard. Each brings his or her own personality and skills to the part, turning a dusty character from a script into a living and conflicted villain.

There are myriad ways to "play" your opening statement and trial persona. Each lawyer should develop and be comfortable with his or her own style. Although we can all learn valuable techniques from experienced and great trial lawyers, it is a mistake to think that we can fundamentally change or mask our natural presentation style. In a situation where you need all your preparation and legal skills simply to mount your best case, attempting to change basic personality and style traits will not work. Artificial or false mannerisms will impede the jurors from getting to know and trust you. Your most effective style will likely be the one to which you are accustomed.

Relying on your own style does not mean that you should refrain from attempting to raise the level of discourse. A great play has the ability to elevate everyday issues into thought-provoking and memorable moments of discovery. Jurors expect that the opening statement (and closing argument) will challenge them to think and care deeply. Not only should you never talk down to jurors, you should aim to talk "up" to them — dare them to be intellectually curious in solving the meaningful conflict of your case. In preparing

your opening, read some of your favorite soliloquies, speeches or short stories. Like a playwright, carefully plan and select the language and imagery you use. Then take the complex ideas of the case and distill them into understandable and memorable themes and facts, structured to make the jurors care about the dispute.

Finish Strong

Whether you leave the jurors laughing or crying (or angry with or suspicious of the other side), finish your opening statement with a bang. Think how in the last scene of *A Midsummer Night's Dream* the young couples are reunited with their proper partners as Puck weaves his spell of words. Leave one or two of your most important points for last. Consider providing the jurors with three questions to ponder or by which to measure the evidence which you will discuss with them during your closing argument. Energize the jury for the start of testimony so it can begin its important tasks. And have your opening's final "scene" fully rehearsed and memorized so that you can talk directly to the jury and be at your most persuasive.

An opening statement offers an opportunity for solemn, high drama. Like a lead actor, make use of this spectacle by taking center stage and commanding the jury's attention. Script your opening to grab the jury with a dramatic first segment, build your theme through the facts and conflicts of the dispute, and finish strong. Challenge the jurors to reach beyond their everyday lives to untangle the web of conflict foisted upon your client. Make them care. After all, you are the playwright and lead actor; how the jurors react and invest themselves in your client's dispute depends on you. Use the drama of your opening statement to "catch their conscience."

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