Daniel Cooper
Dr. Louis Genevie
LGA - Litigation Strategists

Ten Points for the Assessment of Openings and Closings in Complex Civil Trials

From sticking to tipping, elevator speeches to 'back of a business card' summaries, advice on how to effectively communicate challenging topics to difficult audiences has taken on a vocabulary of its own. Asked, as part of our jury research work, to critique and improve opening and closing presentations for patent lawyers and others preparing for a complex trial, we have incorporated many of these current observations into a ten-point assessment.

As we listen and watch the demonstration of a closing in a patent case as part of this year's PLI patent law program, we thought it would be instructive for you to apply our assessment to the demonstration. The assessment calls for the critical observation of the following items:

1) **EMOTIONS**: *HOW DOES THE PRESENTATION MAKE YOU FEEL?*
2) **VALUES:** *WHY SHOULD I CARE ABOUT THE OUTCOME?*
3) **CREDIBILITY:** *WHO DO YOU TRUST?*
4) **UNDERSTANDING**: *DO YOU GET WHAT IS BEING PRESENTED?*
5) **RECALL:** *CAN YOU REMEMBER WHAT WAS PRESENTED?*
6) **RESTATE:** *CAN YOU REPEAT WHAT WAS PRESENTED?*
7) **CORE:** *IS THE PRESENTATION CLEAR AND CONCISE?*
8) **DEPTH:** *DOES THE PRESENTATION REACH THE RIGHT DEPTH?*
9) **PERSUASION:** *DOES THE PRESENTATION MOVE YOU?*
10) **VISUAL:** *WHAT DO YOU SEE FROM THE PRESENTATION?*

Each of these items is briefly described below:

1) HOW DOES THE PRESENTATION MAKE YOU FEEL?

Feelings first!

> "The first key to unlocking the communication code is to understand that when we communicate, feeling comes first. Emotions will always trump intellect, at least in the short term." See, ***CRACKING THE CODE*** **by** Thom Hartmann at page 2

Studies on how we digest information suggest that we process information in a sequence as the external stimulus makes its way from our 'reptilian' brain through the 'mammalian' brain to the 'neo-cortex.' As a result, as our five senses receive an external message, our first reaction is feeling not thought. See, Hartman at page 59.

This is not to say that how we initially feel about a message determines how we ultimately think or even feel about that message. Indeed, our analysis of the message – why we feel the way we do; whether we should feel the way we do; what we should do about how we feel – becomes a key aspect of our decision making.

Recognition that feelings come first and set the stage for the analytic assessment of information highlights the importance of understanding how your message is being felt by the jurors. So ask yourself: "What emotion do you hope to create?" Your presentation to the jury will generate feelings and those feelings should not be the unintended consequences of a well crafted and delivered argument. Instead, you should decide what feelings help you communicate your message and how to best elicit those feelings with both the tone and substance of your presentation.

As the first assessment point, ask yourself what you felt hearing the argument and then ask the presenter what feeling he was striving for, what alternatives he considered, how he set about generating that feeling, and why that emotion was the most powerful tone for his presentation.

2) WHY SHOULD I CARE ABOUT THE OUTCOME?

You can not effectively communicate with someone who is not paying attention. Indeed, the success of a communication exchange is found in what is heard, not in what is said. Jurors are more likely to pay attention and to act or decide your way if they care about your case.

On a very fundamental level, most jurors are trying to do their duty in a responsible way. We have found that most jurors at least try to learn the case, evaluate the evidence, and reach the 'right' result. But their enthusiasm and willingness to fight for their decision is a product, in part, of whether or not they have been given a reason to care about the outcome. Everyone believes that voting in this year's Presidential election is important, but unless they care about it, the belief will not be enough to generate the act of voting.

How can you help jurors care about your case? We have found that tapping into one or more fundamental values is a key to getting jurors to care. There are many values at stake in a patent case: the value of hard work; the importance of innovation; appreciation of perseverance; helping people solve real life problems; following rules; and fundamental fairness and respect in personal and professional relationships. Each of these value sets is part of the unstated text in many invention stories and in the stories underlying other complex business cases.

We have found the values that have the greatest impact are those that help jurors feel that there is something at issue in the case that matters to them. The 'what's in it for me' principle is difficult to apply in the context of a patent case. How can you align your client and your case with the interests of the jurors?

The first step to finding an answer to this challenge is to listen to your audience. Visit the jurors world, listen to them talk about your case, avoid imposing your world view on

them and instead adjust your case presentation so that it fits into their world, their experiences, their language, and their concerns. Like rubber bands, jurors will snap back to their world, their values, and their experiences when trying to address difficult issues.

3) WHO DO YOU TRUST?

When was the last time you were persuaded by someone who you did not trust? If you are like most jurors, it is very difficult, if not impossible, to think of such a time. Credibility is the cornerstone of any effective communication. To be credible, a speaker – whether lawyer or witness – needs to be perceived as both knowledgeable and trustworthy.

In a patent case, creating the perception of knowledge is the easier of the two credibility components. The complex nature of the technology, the difficult regulatory scheme, and the central role of scientists create a presumption of knowledge or ability. The jurors presume you couldn't 'play' in this world if you were not at least knowledgeable.

Trustworthiness, however, is not as easy to establish. Credentials, experience, openness, fair use of information, third party confirmation, and whether the arguments appeal to the common sense of the jurors contribute to the credibility of the speaker. It is a mistake to assume that you begin a case with credibility. Trust needs to be developed and protected throughout the trial.

Thus, another component of the assessment of the opening or closing is to determine whether it is enhancing or diminishing the trust that the jurors feel for the advocate and for the case. Your opening either explicitly or implicitly made some promises about your case and your client. Can you close the deal in the closing by showing jurors how you have honored your commitment to them to prove or defend your position?

Does the closing convey knowledge of the material and the trustworthiness of the evidence and of the speaker? Does the closing clearly establish why you and your client should be believed – not because you say so but because you have given the jurors reasons to trust, and no reason to distrust you, your witnesses, or your case?

4) DO YOU GET WHAT IS BEING PRESENTED?

In ***Cracking the Code***, Thom Hartmann quotes Ralph Waldo Emerson:

> "Put the argument into a concrete shape, into an image, some hard phrase, round and solid as a ball, which they can see and handle and carry home with them, and the cause is half won."

It is difficult to be convinced by an argument you don't understand. We have often been asked by frustrated patent trial counsel how they can better communicate the very complicated technology of a patent case to a group of ordinary, non-technically trained jurors. We hear phrases like 'dumbing down' and 'teaching to a seventh grader.' We react to such statements with concern because these phrases reveal a distrust, dislike, and distain for jurors, and we have seen that jurors sense this unstated message from counsel. Needless to say, it starts the relationship between attorney and jury on the wrong, often irreparable, foot.

It is very hard work to make complicated material understandable but that is the challenge for an effective patent trial lawyer. Good teachers don't blame their students and good patent trial lawyers don't blame their jurors if their message is not understood.

Complicated material needs to be broken down so that foundational ideas are taught first. Jurors should feel that counsel wants them to be fully prepared to understand the material that they are going to be asked to evaluate. Many jurors come to patent cases with a high degree of uncertainty, anxiety, and concern about whether they will be able to handle the complex technical material. Thus, whoever prepares the jurors best and quiets their anxiety about the material has an important leg-up.

Science is real and it provides concrete solutions to actual problems. Jurors need to be brought to the lab, to the garage, to have their feet on the ground so that they live the invention story. Presenting information as a story gives jurors a chance to live the case. Living the case in their minds allows for a much better understanding of the case. Inventors are real people, struggling with real problems, overcoming great frustrations, disappointments and failures, to find truly new and important solutions that work. The closer the jurors come to living the experience with the inventor, the better they will understand the issues and technology of the case.

When possible, complicated material should be expressed in the positive and affirmative, rather than in the negative. People are often better motivated when told what they should start doing, rather than when told what to stop doing. If you want to get your child away from the computer, you have a better chance if you suggest that they go outside to *start* playing rather than if you suggest that they *stop* surfing the net. The result is the same, but the invitation of how to get there is very different. Is it better to ask if a claim is *not invalid* or that the claim *is valid?* When considering if a product is equivalent to a claim, do you think it more effective to ask jurors to consider that they *are not* substantially the same or that they *are* substantially different?

5) CAN YOU REMEMBER WHAT WAS PRESENTED?

The most important objective of an effective closing is to give jurors the ability to take your case into deliberations and become advocates to advance your positions against opposing points of view. To do so, as discussed above, they need to understand, trust and care about your case. But that is not enough. Jurors also need to remember and articulate the most important aspects of your case.

It is not a headline to suggest that jurors remember stories better than they remember a series of stacked facts and arguments. The problem with good story telling is that it is difficult to do well. Tracking the relevant events on a timeline is not a story; it is just a way to organize facts. Crafting together the elements of a story -- plot, themes, character development, and dramatic tension building -- in an integrated and efficient way, restricted by the rules of evidence and the available facts -- takes time and talent. But it is well worth the effort.

Whether or not the opening or closing presents a good story is a threshold question as you listen to the PLI demonstration or as you prepare your own closing or opening. The inquiry, however, does not stop there. Some additional questions you might ask include: Did the story develop the themes of the case in a clear and concise way? Is the plot understandable? Are the key events credible; that is, are they concrete and do they comport with common sense and real life experience? Does the story present a solution to the conflict between the party's different views of history and events? And, does the story generate a positive feeling about the people involved in the dispute?

Writing and re-writing an effective story is a challenging process for most writers, let alone for most trial lawyers. Once written, learning to deliver the story effectively is a process of its own even for experienced story tellers. The investment of time and energy in advance of trial in developing and refining both the story and the story telling is well worth it. Indeed, if you think about those who use stories – from writers, to actors, to advertisers, to politicians – few, if any, deliver the first draft, unrehearsed version of their story. Patent trial lawyers should be no different. Re-writing and rehearsing are indispensable elements of trial preparation and performance.

6) CAN YOU REPEAT WHAT WAS PRESENTED?

Jurors need to see and hear the case but to be effective advocates in deliberations they must be empowered to restate your arguments at the right moment in the jury room. Giving jurors the ability to restate the essential aspects of the case during deliberations is

yet another difficult challenge for trial counsel. Here again, a story is easier to re-tell than a series of stacked facts or arguments. But a story is not enough. Words matter and the words and phrases used by jurors in their day to day lives are easier for them to apply than hearing and learning new words.

Jargon – whether scientific or legal – is exclusionary, not inclusionary. It is often used to designate who is 'in the club' and who is not. Adjusting your language and that of your expert is not 'dumbing down,' it is moving your case into the jurors' world rather than trying to move them into yours. You would not try to teach French students difficult new concepts by using colloquial English expressions; rather, you would learn the applicable French expressions and teach in their language. By doing so you wouldn't be 'dumbing down' but you would be finding common ground.

7) IS THE PRESENATION CLEAR AND CONCISE?

Whether you call it finding the 'core,' the 'theme,' or the 'organizing principle,' finding the conceptual and emotional heart of your case and paring it down to its lean form is another challenge for the effective trial lawyer. In their book ***Made to Stick***, Chip and Dan Heath identified the concept of 'feature creep.' Using the remote control of a VCR, they explain that there comes a point on a remote control that adding another feature button makes it less rather than more useful.

Knowing when you have added everything you need and no more – even when you have the time and space to do so – is a critical design judgment. As the Heath brothers pointed out: "When your remote control has fifty buttons, you can't change the channel anymore." See, ***Made to Stick*** at page 50.

To craft an effectively lean opening that hits, rather than hides, the core, trial lawyers should keep the maxim of Antoine de Saint-Exupery, reported by the Heath brothers, about engineering elegance: "A designer knows he has achieved perfection not when there is nothing left to add, but when there is nothing left to take away."

Ask yourself what you understood as the 'core' of the presenter's closing and then see if you and the presenter concur. And, remember, you are a trained listener so consider what untrained ears and eyes would identify as the heart of the case. Do not fear or become frustrated by how others re-state your case. Instead, see it as your challenge to make sure you have boiled your case down to its essence so that it can be heard, digested, remembered, and re-stated in the way you want it to be. Such an assessment is a good test of whether you have done the work to succeed with less rather then confuse with more.

8) DOES THE PRESENTATION REACH THE RIGHT DEPTH?

Having just spoken of the elegance and effectiveness of being concise, it is difficult to also ask presenters to reach the right level of depth in their opening or closing. Nonetheless, credibility and persuasiveness require more than memorable cores or themes. Effective openings and closings need to provide the right details -- the evidence -- that convince and give confidence to the jurors that the position you are asking them to advance is the right one.

In searching for the appropriate level of depth, it is useful to remember that: a) there are limits on how much any juror can digest and utilize at a given moment in time; b) grouping or integrating a number of details around one concept allows for the recall of the concept even if the details are lost; and c) depth should, at a minimum, allow your jurors to respond in the course of a dialogue to the counterpoint of any adverse juror.

It is a well known tenet in psychology that the human brain can attend to only about seven things at a time. We lose, change, or generalize most of the information coming in to us. You can keep pouring water into an already filled glass but recognize that the new water only replaces, does not add to, the old water. So too with your presentation – you can keep dumping in new material, but remember it is at the risk of replacing the old. Your challenge is to fill the glass with the most important material – no more, no less.

One way to help people hold on to more information is to give them a way of grouping or organizing the details. Build from your core: the core is supported by a number of pillars, which in turn are each supported by a number of key facts. In the end, if the core has value to the jurors and if the pillars are memorable, can be restated, and are credible, then you have armed your jurors to do battle in your interests during deliberations.

And, the last word in the deliberation dialogue matters. We often hear jurors reach an impasse on a particular issue during deliberations. Jurors favoring one point state the fundamental position, essentially the headline, of the party they favor and then the jurors favoring the other side respond with their headline provided by the party they favor. What we don't hear often enough is the next level of the dialogue – 'yes, I understand that is your position but remember that point was refuted by…' Often, there will be a point-counterpoint discussion in deliberations and if you have armed your jurors so that they can engage and make the last point in the give and take on the key issues, the chances of reaching your desired outcome are greatly enhanced.

9) DOES THE PRESENTATION MOVE YOU?

In the end, closings must anchor supporters and, hopefully, persuade at least some dissenters. You have developed an effective message: one with value that is understandable, memorable, repeatable, concise, and credible. In delivering it, you have created a relationship with your audience so that they pay attention, trust you, and care about what you are saying. But, if you have not given them a reason to fight for you and your client and if you have not moved them to your side and anchored them there, then all your efforts may be for naught.

The moral of most stories is that a difficult challenge was overcome, a tested relationship secured, or a new idea advanced against adversity. The story of your case, of

your client, resulted in something happening. Why was that resolution a good one; one with which the jurors can align themselves in deliberations?

This is a bit different from presenting a case about which jurors care. It is the difference between a) crafting an interesting story that puts into play values that are important to the jurors and b) delivering, as the proposed resolution of the tensions in the case, answers that the jurors feel compelled to accept.

10) WHAT DO YOU *SEE* FROM THE PRESENTATION?

When assessing a closing or opening, it would be a significant oversight to ignore the non-verbal aspects of the presentation. Of course, the manner and style of the presenter make a difference and even the best speech relies on the skills of the speaker to be effective. Presentation style, however, can not be given its full due in this brief discussion.

But there is an aspect of the non-verbal presentation that is very much related to the substance of the presentation and that is the visual or demonstrative presentation that accompanies the narrative. As to the visual closing, it should be given a similar assessment as that which is being given to the narrative: How do the visuals make you feel? Do you care about and trust what you are seeing? Is it understandable, memorable, repeatable, concise and clear?

Far too often, we have seen trial counsel rely on a PowerPoint type deck of visuals. Indeed, the slides take the place of the outline, acting as cue cards with the narrative little more than the fill needed to move from one slide to the next. The time has passed for PowerPoint closings. Among the shortcomings of such graphics is that they are one dimensional, typically text intensive, and generic in appearance, none of which makes for effectiveness. So what are some of the ingredients of the effective visual case?

Learning theory tells us that there are three types of learners: auditory, visual, and kinesthetic. Effective teaching – whether in the classroom, on the political stump, in advertising, or in the courtroom – is multimodal. The visual case needs both to reinforce the narrative case for the auditory learners on the jury and teach the case to the visual learners.

When evaluating the demonstratives consider whether they capture the attention of the jurors, communicate a clear and concise message, present credible information, and generate memorable images. Does the slide speak for itself? Is the message buried in too much text or in too many images? You might find it useful to remember and apply to each of the pieces of your visual case and the visual case as a whole the maxim of Antoine de Saint-Exupery discussed above for perfecting design: "A designer knows he has achieved perfection not when there is nothing left to add, but when there is nothing left to take away."

In finding the right visual case, use all the resources available to you in the courtroom. Electronic presentations have their role as an efficient means of presentation. But boards, hard copy that jurors can touch, demonstrations, and even writing on a flip chart or white board also can be very effective presentation mediums. Fit the medium to the message rather than vice versa and recognize that variety – multimedia – especially in a long and complex case, has a better chance of keeping the jurors' attention.

We trust you will find the foregoing method of assessing an opening and/or closing useful as you watch the demonstration. We have also found it very helpful in the preparation and practice of actual trial presentations. We consider it a work in progress and look forward to your comments and suggestions.