

4 Steps To Repair Defense Credibility In Opening Statements

By **Ken Broda-Bahm** (June 27, 2024)

In recent weeks and months, civil juries have awarded \$80 million against Zurich American Insurance Co., over \$90 million against The Boeing Co., \$107 million against AstraZeneca PLC and \$242 million against Microsoft Corp.

These are just a handful of results within a broadly perceived trend affecting civil defendants. The record-breaking \$14.5 billion in so-called nuclear verdicts last year, as reported by Risk and Insurance,[1] is being driven by increasing juror desensitization toward large numbers, accompanied by a rise in anti-corporate sentiment.



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In response, there has been a call for new thinking on defense side.[2] The need is for fresh approaches to cut against the factors motivating jurors toward extreme verdicts.

The approach outlined in the book "Nuclear Verdicts" by Tyson & Mendes LLP partner Robert Tyson emphasizes building defense-side credibility in order to undercut the levels of anger that can lead to outlier damages awards.[3]

That justifies some fresh attention to the first impressions defendants create in opening statements.

Defendants generally understand the need to portray a credible image in their initial story to jurors in opening statements. But in effect, defendants often act as though they are painting on a fresh canvas.

In reality, we should assume jurors already have strong first impressions formed during voir dire and, especially, the plaintiff's opening. Ignoring those impressions can set the stage for an angry jury.

Think about it: They've just heard a parade of horrors about the effects of your negligence, and then, instead of first addressing any of that, you're talking about your client's history and commitment to principles.

When the bad facts are still ringing in their ears, jurors are ready to hear none of that, and a generic "good guy" story can seem disingenuous. That's a bad way to start.

A better way is to recognize where jurors are at, and to prioritize the need to repair that credibility first. In this article, I'll share one formula that can be applied to that end.

One good general approach includes four steps for a defendant to follow at the start of opening.

1. Acknowledge what jurors are probably feeling at the start.

You don't want to boost or amplify the other side. At the same time, it doesn't work to ignore the likelihood that plaintiffs have used their opening to create an effective first impression.

Based on a mock trial, you might have some reasonable insight into what the average person will think after hearing just one side of the story. Or, having had the opportunity to hear the plaintiff's opening and observe the jury during those critical moments, you may have a good sense of those early perceptions.

If the plaintiff's counsel has done their job, they've probably gained some ground, and have some or even most of the jurors at least tentatively leaning their way.

When you acknowledge that, you're likely to win some credibility and to give jurors a reason to listen. This might sound something like:

After what you've heard so far, I'm not surprised if you believe the product and the company that makes it are both unsafe — a company that ignored danger and created an accident waiting to happen. If that's what you think right now, I understand, and based on what you've heard, I don't blame you.

2. Accept responsibility — not blame.

A central point in the "Nuclear Verdicts" approach is to offer the jury an acceptance of responsibility. That doesn't necessarily mean accepting liability or blame for what went wrong, but it does mean more broadly accepting a responsibility for upholding the social good that a jury would expect you to uphold.

In order to see you as credible when denying liability, jurors will need to first see you as credible with regard to the responsibility you're accepting. Convey an understanding that you have an important role in preserving safety, fairness, respect and the greater welfare.

Instead of just saying "no" to the accusations, you're also saying "yes" to a specific positive and pro-social role. You might say:

We know we have a clear responsibility — both legally and ethically — for the safe design and manufacture of this product. We embrace that, and it's a responsibility we take seriously. You will hear about the comprehensive steps the company takes to make sure we keep that a reality.

3. Reveal something they haven't heard.

Instead of just asking jurors to have an open mind, show them the reason why they need to have one. One of the best ways to do that is with a "Here's something you haven't heard..." appeal, or, failing that, "Here's something the other side didn't emphasize very much..."

This may need to be a game-time decision, because you won't know what the plaintiff covers in opening until you hear it, but it can be roughly predictable that the plaintiff might omit or play down a fact or two that helps you.

The important message is that jurors should be open to reconsideration because critical facts have been left out. Front-loading those facts can help you shift some of the credibility toward you and away from the party that didn't tell them the full story.

For example, consider the following message:

In the opening you just heard, you did not hear much at all about how [the plaintiff] was using the product. You didn't hear that, by his own testimony, he didn't read or even see the manual. They didn't emphasize that [the plaintiff's] way of using this product was specifically warned against in the manual.

4. Reframe around what this case is really about.

A central part of defense opening should be a proactive theme: a short distillation of your case that tells jurors what kind of story they're going to hear. If the plaintiff has, for example, framed their story around a senseless tragedy brought on by inattention, then a defendant will need to reframe jurors' understanding away from that.

If you are able to recast the narrative as being about something else — something that directs jurors toward the responsibility you've accepted and the facts that favor you — you can open up the possibility for jurors to set aside their early impressions and take a fresh look at the case.

You can do this by saying something like:

Ultimately, this case is about using the information you have. The company uses all of the information it has when it designs, manufactures, tests and warns about the product. Customers also need to use all of the information they have when they decide how they will use the product.

Conclusion

The main point is that you want an aggressive message, but one that is also sensitive to the fact that you are being attacked by the other side.

Certainly there are other steps you could add to an introduction, and other ways you can customize your message to the unique issues of your case and venue. But this sequence — acknowledge, accept, reveal and reframe (two A's and two R's, for mnemonics) — is a simple and broadly applicable start.

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[1] <https://riskandinsurance.com/nuclear-verdicts-reach-record-14-5b-in-2023/>.

[2] <https://yourtrialmessage.com/defendants-argue-damages-differently/>.

[3] <https://www.tysonmendes.com/nuclear-verdicts/>.