

{Expert Opinion}

## Quit Thanking the Jury in Opening —Inspiration from Leon Black

'There is simply no excuse, in any case, civil or criminal, big or little, business or bloody, that the very first words you speak to the jury are not a critical part of the story, the theme, the reason you are making them listen to you, with the goal of demonstrating the strength of your case' writes Blank Rome's Insurance Recovery Group chair Jim Murray.

By Jim Murray  
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We all waste time. But the most regrettable is that first 30 seconds—of an introduction, of a presentation and, yes, of an opening statement.

Comedian and actor J.B. Smoove recently told Howard Stern the hilarious story of his first 30 seconds during an audition for the role of Larry David's sidekick, Leon Black, in "Curb Your Enthusiasm."

Smoove walks into the room, with his head full-tilt and sporting bad-ass attitude, to meet the producers and directors, in character, as Leon.

"Leon" appears immediately, no gratuitous introductions such as "Hi, I'm J.B. Smoove and I'm here to audition for the role of Leon Black. The following is my take on this character."

That traditional introduction, Smoove explains, by definition, puts the actor on the defensive, repeating the obvious while losing part of the critical first 30 seconds. Instead, Smoove waltzes up to Larry David and, in character, says "Improv?? Let's do this then, who knows what happens, maybe I slap you in the face, I don't know [multiple f-bombs deleted]."

The producers later confided to Smoove that he had the part before he even opened his mouth because they saw and experienced the character. Smoove credits it to the power of immediacy, of

mannerisms, of not having the exact script.

Smoove has much to teach trial lawyers. Here is how Leon (as juror) might react to the first moments of many case-book opening statements:

"First, Ladies and Gentlemen."

Yes, those are two options. Best case, gratuitous, worst case, you have already insulted the gender neutral.

"...of the jury." Who else? You are standing right in front of them.

"My name is John Jones."

Yes, your name has not changed since you were introduced twice during voir dire and again moments ago when the court introduced opening statements.

"This is what we call opening statement."

Sure. Why not isolate the jury even more than they already feel...the royal "we" call this opening statement? Now you know. By the way, didn't the judge just say that when she said, "Now give your attention to the opening statements of counsel"?

"I want to give you a roadmap of the evidence in the case."



A what, a roadmap? That reminds me, before I was called to jury duty, we were supposed to drive to visit our good friends, and instead I'm here listening to you.

"What I say is not evidence."

Now that really makes me want to pay attention.

"It is a great privilege for me to represent my client today, Mr. John Smith."

Is it? Are you not getting paid to represent him? And by the way, he looks a bit greasy and unreliable, so that makes you...move on.

And, of course, the never-sincere, always patronizing, "I want to thank you for your service and for taking this time out of your schedule."

Did you not listen to my answers during voir dire? I was laid off months ago and that is why I could not convince the judge to let me out of having to sit and listen to you."

These hornbook riffs squander valuable first-impression time. You place yourself on the defensive in terms of the jury even wanting to listen to you. Smoove would say you failed to metaphorically slap jurors in the face with something of interest, of power, off script, of immediacy.

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Songwriters, like actors, know this. Pick the opening line of any compelling set of lyrics: "Well, my friends are gone and my hair is grey and I ache in the places where I used to play" (Leonard Cohen, Tower of Song); "Fat man sittin' on a little stool, takes the money from my hand while his eyes take a walk all over you" (Bruce Springsteen, Tunnel of Love); "Wanda had a baby, 1951, the father was a stranger, a stranger was the son." (John Prine, Six O'clock News).

You are there...immediately. Based on a three-second lyric, you want to know more. Why are your



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friends gone? What are you buying from the fat man? Is the son a stranger to Wanda?

Opening statements are not, of course, one-line song snippets. Still, the reasons for their success or failure share the same attribute—no wasted time. Compare the first few lines of the opening statements from the Oklahoma City Bombing Trial in 1997:

Prosecution [Joseph Hartzler]: "April 19th, 1995, was a beautiful day in Oklahoma City—at least it started out as a beautiful day. The sun was shining. Flowers were blooming. It was springtime in Oklahoma City. Sometime after six o'clock that morning, Tevin Garrett's mother woke him up to get him ready for the day. He was only 16 months old. He was a toddler; and as some of you know that have experience with toddlers, he had a keen eye for mischief...That morning she picked him up and wrestled with him on her bed before she got him dressed. She remembers this morning because that was the last morning of his life."

Defense [Steven Jones]: "Special Attorney to the United States Attorney General, Mr. Hartzler, and to Mr. Ryan, the United States Attorney for the Western Judicial District of Oklahoma and to Mr. Timothy McVeigh, my client, I have waited two years for this moment to outline the evidence to you that the Government will produce, that I will produce, both by direct and cross-examination, by exhibits,

photographs, transcripts of telephone conversations, transcripts of conversations inside houses, videotapes, that will establish not a reasonable doubt but that my client is innocent of the crime that Mr. Hartzler has outlined to you. And like Mr. Hartzler, I began where he began.”

But he did not begin in the same place. He stayed out of character for 30 seconds. It was too late to smack anyone.

None of this, of course, is limited to acting or to trial lawyers.

Former CBS television talent and casting head Milo Frank wrote a book called “Get Your Point Across in 30 Seconds” from a business perspective. Frank teaches business leaders of the Fortune 500, underscoring why television commercials are limited to 30 seconds and even top news stories are rarely more than 90 second.

His mantra: why do so many people bore us in minutes when they could interest us in seconds?

The soft sciences examined this topic years ago. Nalini Ambady and Robert Rosenthal laid claim to the term “thin-slicing” to describe our ability to find patterns in events and situations based only on “thin slices” or narrow windows of experience (be they perceptions, details, descriptions) of an individual or a situation.

These studies were popularized in Malcolm Gladwell’s “Blink: The Power of Thinking Without Thinking.” Gladwell argues that we are “thin-slicing” constantly in every aspect of our lives. When we judge any situation—social or professional—we take a small portion of the person or statement and we extrapolate (we look for theme) and generally do it well. Our initial two-second judgments are often as accurate as judgments derived from rigorous analysis.

That ability is not limited to the spoken word. Think of the accomplished writer, say, a senior law partner. While she might hate to admit it, we know

that when she is given a draft brief by a new associate, she knows within 30 seconds of reading, no more than a few paragraphs, whether the draft brief is good or bad. Within seconds of beginning to read the brief, her mind is either at ease, with the relief that light edits will be a pleasure, or with anxiety, knowing a complete rewrite will be in order.

Slapping the jury with your first words in opening is not an easy challenge. It is not intuitive. But it works. Even the National Institute for Trial Advocacy misses the mark in teaching that the first line of opening must be “This is a case about [state the theme of the case].”

This formulaic wording necessarily states the trial lawyer’s opinion, it expresses to the jury a conclusion rather than providing a captivating first line of facts of the story, underpinning the reason you should win.

It would be like Smoove coming into the audition and telling the producers: “My view is that Leon is a guy who lives day to day, is a bit of an opportunist, but he’s got your back.” That is, in fact, how Smoove describes Leon’s character. Smoove knows, however, that it is not nearly as effective as showing the character in those precious first 30 seconds.

Take it from Leon; he has our back.

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