



Nicholas C. Rowley



Brutal honesty

Telling the human story, from voir dire through opening statement

Every lawyer has the power to get justice in a courtroom. In my experience, with my wins and my losses, I know that if we can connect with the human story and share it with a group of jurors who we have connected with, the power we yield is hard to defeat. In your own case, once you learn the human story and are able to feel it, you are ready to win by sharing it. The only way you can become a better trial lawyer is to try more cases but most importantly become better at being a human being and understanding yourself. I have been fortunate enough to have tried many cases. I have learned that as good as I might sound and as much courage as I might have, I am at risk of losing if I am not connected with my client and jurors as human beings who I care about.

A theme I live by in trial is "brutal honesty." If we cannot be brutally honest with ourselves, then how can we begin to connect with our clients and our jury? The answer is, we can't. And if you're not brutally honest about your case, its ups and downs, good, bad and ugly, then we cannot ask jurors to do what we need them to.

The human story

The story begins with you. You are the human who loves, feels, hurts, cares, hates, betrays, fears, regrets and who has that so very important ego to protect. Human feelings are the basis of every juror's decision. Once we care and

connect with our clients, only then do we have the right to ask jurors to do the same.

To become our client's voice and to be able to tell their story we should always start with the most important resources we have, which are the humans that are most accessible to us; our clients, their families and friends. Spend time with your clients in their homes. Look at photo albums. Spend time at the scene of the injury with your client if you can. Go to medical appointments with them in regular clothes.

Understand the inconvenience of everything they are going through. Our clients are the basis of our cases. Without them, there would be no case.

Written discovery and opposing counsel do not matter as much as people think. They are just hurdles, bumps in the road we have to navigate over and around. If we get too wrapped up in written trench warfare litigation, fear, and believing inaccurate medical records and police reports, we lose track of the human stories that make a case important.

I want to give you an example of what I am talking about from the Sofia Blunt case. This was a tragedy of a medical malpractice case that my partners Robert Ounjian, Rod Ritner and I tried together in San Luis Obispo. In Sofia's case, I asked her parents to tell me as much about Sofia as they could. To tell me what Sofia liked and

disliked. Who Sofia was. What makes her happy? What would make her smile? What her daily routine is. I did this by asking her parents to speak to me as though they were Sofia. But before I did this, I first had to open up and tell Sofia's parents about myself. I spent a lot of time with the Blunt family in their home. My own children got to know the Blunt family and Sofia and her sister Charlotte. We became family friends. When I stood in court for them I was standing for people I loved and cared about. I didn't need notes and was not confined by what the medical records said (the medical records told a false story anyhow).

So start learning the human stories by spending time with the humans in your case and not the medical records and depositions. There is always more to a story than what is written on a piece of paper. You may have a great case with great experts, but if the foundation of your case relies on the "cold hard facts," your human story will be lost and you risk not having jurors connect and value the case as they otherwise would.

If you can say that you care about your client and understand what they have gone through, you have done the first part of your job. Jurors will see when you are sincere about your story and with that you have credibility.

A good lay witness that the jury connects with can beat a strong defense

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expert any day of the week. I try to connect with and tell the story at trial through a few good lay witnesses and I have them tell the jurors how many hours, days, weeks, months, years that they have personally

witnessed the damages of the human being I am representing. I then contrast that to the defense expert who spent 20 minutes with my client and does not even remember what he or she looks like.

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Mini opening statement

California law provides for mini-opening statements. The current version of Code of Civil Procedure section 222.5 calls for the parties to present mini-opening statements prior to voir dire upon request, "The trial judge should allow a brief opening statement by counsel for each party prior to the commencement of the oral questioning phase of the voir dire process." You should try to get permission to get a mini-opening statement for every trial. Judges are becoming more receptive to the idea because it can speed up the process of jury selection. By summarizing your case in three to five minutes to an open jury pool, you can let them know what your case is about and find out who can be fair and impartial and expedite voir dire.

Voir dire

Voir dire is the most important part of the trial because it is the beginning of relationships. The primary purpose of voir dire is to establish a human connection in order to build a team of open-minded, caring individuals who care about justice and who will work hard to see that justice is served. Many great trial lawyers have said it and I believe it; you can win your case with voir dire.

Starting your voir dire is like approaching a stranger you want to get to know. Even though there is a smile and maybe an opening line, there is skepticism, caution and the aura of nervousness. Remember, at the beginning of voir dire, we have no control over jurors and more importantly, we have no credibility. Credibility is something that must be earned and it must be done early. First, start by accepting potential jurors as they are. Do not reject anyone. Generally, we as lawyers start stereotyping, objectifying and rejecting jurors immediately because we are afraid. You cannot reject a juror and then expect them to like you and connect with you. Humans do not fit into boxes, so don't label and stereotype.

Try to be open and honest with the jury and they will reciprocate. You can start this by being inclusive. Try to build a team rather than excluding people, or

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kicking out people purely on pre-judged notions. Be confident in yourself and your case and know that it does not matter what you are talking about so long as you are sincere and you connect. As you are making the connection, now would be a good time to bring up the money issue. It is helpful to be honest with jurors right from the beginning, so why not tell them what amount of money you are asking for? Let jurors know what you are asking for after you have built some relationship. Let them know what your client is worth. Being upfront about it will save you a lot of time and energy.

Jurors are the most important part of our case, so we must truly listen when they talk. As lawyers we are not taught to listen; we are taught to talk, to be in control, to get our message out there. Many jurors do not want to be on jury duty, so do not

waste their time. Jury selection is the time when you have to force yourself to just listen. I typically start voir dire by asking what "brutal honesty" means, and it has been an effective method. Use your eyes and your hands to invite the jurors to tell you what they are thinking. Let the silence become almost uncomfortable at times until they respond. Listen to their responses and watch them respond. Feel their words resonate inside of you. Allow yourself care about what they are saying. Slow down and do not interrupt with a question. Have a conversation with them, not a question and answer session.

Next, truly thank them for their time, their response and overall participation in the justice system because frankly without them, there can be no justice.

Then, get the rhythm going by inviting other jurors to respond by saying

something as simple as, "Mr. Johnson, how about that?" Some other short cues are:

- "Please tell me about that."
- "Please say more."
- "Would somebody please talk to me?"
- "Who else feels this way?"

One particular way to show you are listening is reversing roles with the jurors to feel the same human emotions. So, if you're not listening, you cannot feel anything that is going on. If you are thinking of your next question before a juror finishes responding to you, you are not listening, and the jurors will know it and not appreciate your sincerity when you say thank you.

Non-economic damages

As I write this, I am trying a completely non-economic damages case in

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Orange County with Daniel Ambrose from Michigan and Tiffany Chung of my office as co-counsel. Voir dire took two full days and, together, we faced what I believed to be the most conservative jury panel I have ever experienced. Approximately 75 percent of our first panel of jurors were disqualified for cause because they believed in a philosophy of “no money for pain and suffering.”

To deal with the issue of “money for pain and suffering,” we did a lot of brainstorming and came up with “What is special about people?” as our theme because our case involves only non-economic damages, i.e., a pain and suffering claim, we needed jurors to have in their minds what it is like to have a part of a person’s personality destroyed or changed as a result of injury and the importance and value of

the special things that make us who we are as human beings.

Jurors responded very well and were able to open up to us and provide some characteristics we could relate to our plaintiff. Having the jurors think about their own lives and listening to them reflect was a great lesson for us to address our non-economic damages case. It was tough at first, but ended up working out well and here is the story about the voir dire in the trial (win or lose) we are currently in:

In our case, the only question for the jury will be causation and non-economic damages. The injury is one of a soft-tissue shoulder injury and a mild traumatic brain injury. Liability was admitted the first day of trial. The collision is constant-ly referred to as “a low speed car acci-

dent.” We did have medical bills of \$8,000 but chose not to ask for them because our client has Kaiser. At the scene, the client said she was fine and refused treatment and an ambulance. The car was drivable. She went home, started having headaches, nausea, vomiting, blurred vision, and later that day went to Kaiser urgent care where a “possible concussion” was diagnosed. A CT scan was ordered which was normal and she was sent home, never diagnosed with a brain injury until 700+ days later. I am asking for many millions of dollars for her past and future non-economic damages because I believe that she has a life-long mild traumatic brain injury, which was misdiagnosed and not treated as is often the case with brain injury victims. In opening statement the defense lawyer for Mercury Insurance told the jurors he

would be asking them to come back with a zero verdict and that “any amount over \$15,000 would be a travesty”.

As I usually do, I brought up the money issue early on in voir dire. I want to be brutally honest with jury. This time, non-economic damages caused a lot of negative responses from the prospective jurors. Then Dan Ambrose suggested that we hold off on talking about the money and to first talk to the jurors about how valuable our client’s losses were by talking about the jurors’ own personal losses. I didn’t want to do this. So, I did it the way I usually do. We had a very hostile panel of jurors. Later we called up an additional panel of jurors because many were excused for bias and prejudice against large money verdicts. We decided to take a different approach with this new group and it worked out beautifully. We figured a way to talk to the jurors about their own “non-economic assets” and do it in a way that did not walk the line of the “Golden Rule” (asking jurors to pay the dollar amount for damages they would personally want if a similar injury happened to them). Here is what Dan, Tiffany, and I figured out and the approach I took:

Q: This is a case where the only issue for you to decide is non-economic damages. No medical bills, my client has Kaiser, so her medical bills are covered. No lost earnings because she is a stay at home wife and mother, a homemaker. The only thing we are here to do is have you put a value on non-economic damages, her losses as a human being; pain, suffering, loss of enjoyment of life, and other categories that the law provides for. A lot of people from our earlier group of jurors said they personally didn’t believe in money for pain and suffering and could not be fair and impartial jurors because that is the type of case this is. I need to ask you if any of you feel the same way. Do any of you believe, even a little, that a person should not come to court for money if the case is only about pain and suffering damages?

A few jurors expressed some concerns but it was not at all as adversely against money for pain and suffering as the prior venire.

Q: If I were going to ask for over \$20 million, would you want me to be up front with you and tell you now or wait until the case is over?

A: I would want you to tell me now.

Q: Why?

A: So I can think of that in my mind and see if the case is worth that and listen very carefully.

Q: You would rather me be up front and brutally honest with you, rather than surprise you?

A: Absolutely.

Here is how my questioning continued, and how I got into the idea of non-economic damages:

Q: “We are all human beings with special things about us, things that belong to us as humans that make us who we are, our own personal “non-economic assets.” Our personal “non-economic assets” are what make us “special” to ourselves and “special” to the people we love. Would somebody please tell us what is “special” about them:

A: I am a hard worker, I love spending time with my kids, I provide for my family, I have a good sense of humor, and I am a good listener. The type of father I am is special. I am very kind to my children. I don’t raise my voice, I don’t fight with my wife, the people who work for me at my company say I am not like any other boss, and I don’t feel like I am a boss, I am just part of the team. I treat people equally and fairly.

Q: Have you ever imagined a situation or experienced a time when those things which make you special were taken away from you?

A: No.

Q: Could you imagine that ever happening?

A: I hope it doesn’t happen.

Q: The job I am going to ask you to do in this case, your only job, will be to look at what is special about Marilyn Hinman, what her “non-economic assets” are, how her traumatic brain injury has changed her as a person, and put a dollar value on that over a period of 27.6 years. Does it turn you off in any way that I am going to ask you to do that job and equate money to the

loss of special things about a person and changes to who Mrs. Hinman is?

A: No, that is your job.

Q: Will you leave room in your mind for the possibility that it is not cheap, that over 27.6 years the evidence might show it is a lot of money and maybe I am not unreasonable asking for a lot of money?

A: It is certainly not cheap; I will keep an open mind.

Asking jurors to share what made each juror “special” went on and on and it was beautiful. There was warmth and love in the courtroom and the jurors who were remaining in the box from the first panel were nodding their heads, smiling and making eye contact with me and seeing the light to why a case for non-economic damages is important and valuable.

For those of you who are under a time crunch and are only allotted 15 minutes or no time for voir dire at all, your job is still to listen, feel, reverse roles, and connect on a human level every chance you get. Remember, connection is your goal. Even when your opponent is doing voir dire, your job is to connect and validate.

If you win in voir dire through being brutally honest, through caring about your client and connecting with the jurors you are on your way to winning. If you keep that connection with them and don’t betray their trust during the trial, then what you believe about the case will be shared by them in the end and validated by the verdict.

Opening statement

After voir dire, opening statements are the time to show the jury that you have the credibility they started to believe in. Be calm and collected. Now is not the time to oversell your story. Opening statement is not a time to start out with a sad sob story about your client’s injuries and life in shambles. At this point the jurors are not quite involved enough. This is the prime time to remind the jury about the importance of the case in the community before they can care about your client. Keep in mind the full range of intelligence and ignorance that will be sitting on your jury. The jurors will have a full

range of abilities to understand the evidence you provide. At times, some jurors will be sitting in darkness, while others are enlightened, like in any classroom.

Start out slow, with the undisputed facts, then weave in themes of the case and expose the frivolous defenses. It is important that you understand what your story is and what the defense will be saying about your client. Again, be brutally honest with the jury and tell them your concerns. Tell them what you plan to prove and take the main defense themes, address them, and explain how they will be wrong at the end of the day. This way, by the time the defense lawyer gets up, there will be nothing new to be said and his opening will be boring and ineffective. Mention their experts' incredible abilities to distort facts and obscure the truth. Explain what their experts will say and lie about. And explain why they will lie. Then teach your jurors how to expose the lies and how to avoid being tricked by the bad defense attorneys. Let the silence and emotion fill the room as you tell the defense story. Silence is more powerful than words. Silence will allow the listener to focus their attention and open their feelings and emotions to what you are saying.

Keep your opening unpredictable. Whenever I can, I do what I call a "Pulp Fiction Opening" where I start with the end and end with the beginning and mix it up. I keep the jurors on their toes because doing it in chronological order

puts people to sleep. I jump back and forth in time and set scenes and explain to the jurors in present tense what we would see in the scene if we were flies on the wall witnessing what happened during important scenes of the case.

Betrayal

A theme for every case is betrayal. This is what is taught at Gerry Spence's Trial Lawyers College. It is a powerful theme that everyone in that courtroom has felt in their lives. Show the jury the betrayal, bring it into the courtroom, and place it on the defense table. Whether it is the negligence and betraying the trust of other drivers on the road and failing to accept accountability or betraying a patient's trust and letting cancer go undiagnosed for nine months while it grows in the patient's body, jurors can connect with betrayal because they have all been betrayed. Explain to jurors how we are here because the defense is blinded to what was done to your client and they want to move forward with the stamp of approval from the community saying that what they did was okay and acceptable.

Never use a lectern. It is a barrier between you and the jury. Use every inch of space in the courtroom and even your own body as a prop to show the jury the story. Bring the courtroom to life with pictures and scenes by using vivid descriptions and details. Photographs, props and audio-visuals during opening and trial are

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very helpful and the jurors love them. Visual aids linger in jurors' minds, and when you combine them with words and themes, they become implanted and grow deep roots.

Talk about the money

Be honest and upfront about the issue of money damages during opening statements. Own the dollar amount you are asking for. Don't hide from it. You've brought it up in voir dire and hopefully have ensured that jurors are not prejudiced against large money verdicts, in particular for pain and suffering.

Always end your opening statement by thanking the jury and telling them how important and powerful they are, that they are the most important people in that courtroom. Inform them that you will value their time and try to make the trial go quickly. Show them you care and appreciate them by asking if they have questions, or are uncomfortable about something.

These are the beginnings of every trial, so work on your skills. Understanding and beginning with these skills and techniques will lead you to build great relationships with your clients and better knowledge about your cases. These techniques can be used, changed and applied at your own pace. You will become better by working on your skills and building on your own experiences, so try as many good cases as you can.

Nicholas C. Rowley is a partner of the law firm of Carpenter, Zuckerman & Rowley. He has served as an instructor at Gerry Spence's Trial Lawyers College and delivered speeches nationwide. He entered practice in 2001 after graduating from the University of La Verne College of Law and received his bachelor's degree from Park University. Rowley has achieved numerous seven- and eight-figure verdicts and was a finalist for the CAALA "Trial Lawyer of the Year" award several times. In 2009, he received the Consumer Attorneys of San Diego's "Outstanding Trial Lawyer" award.