

# Voir Dire, Opening Statements Key In Fighting Juror Biases

By **Jessica Brylo** (October 24, 2022)

"Jurors make up their minds by the end of opening."

We have all heard that claim before, but is it true?

The answer is: Yes and no. Jurors may not have made up their minds, but their leanings by the end of opening statement strongly influence how they will view the rest of the evidence and the case.

By the end of opening, and certainly as trial progresses, it becomes increasingly harder to convince a juror who favors your opposition. Not all evidence is created equally, and the order matters greatly.



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In this article, I will walk you through the process of human decision making. By learning these basics, you can understand why voir dire and opening are critical. I will also discuss some of the most common missteps in voir dire and opening statements, which can have long-lasting and irreversible effects during trial.

To understand how jurors make decisions and why voir dire and opening affect juror decisions, we have to discuss the principle of persistence and confirmation bias.

In human decision making, persistence refers to the idea that whatever someone comes to believe, they will continue to believe. In other words, beliefs persist.

We see this constantly in the real world. Someone with a conservative viewpoint will see world events and politicians differently from someone who leans more liberal. This divide persists, despite any evidence to the contrary.

For example, in this past presidential campaign between then-President Donald Trump and now-President Joe Biden, facts seemed powerless in convincing someone to change sides. Instead, facts, evidence and arguments further strengthened the divide.

In the courtroom, the same principle applies. As jurors learn about the case from the judge, they may initially lean toward one side. For example, a juror with a nursing background may begin highly skeptical of a medical malpractice case before you get into any questioning. Meanwhile, a juror who lost a family member to a medical error may start leaning in the plaintiff's favor.

Some jurors may have no apparent leaning based on the case facts. However, their backgrounds will undoubtedly create some biases as evidence is presented, whether it is a distrust of men and male experts, or a feeling that rules in society are overreaching.

Take, for example, the currently unfolding trial against five members of the Oath Keepers on charges of seditious conspiracy stemming from the Jan. 6 siege on the Capitol.

For context, according to Pew Research findings, more Democrats than Republicans believe it is "very important to identify and prosecute" Jan. 6 rioters.[1]

In jury selection, the defense spent a great amount of time asking jurors about their views

of Trump supporters, knowledge of Oath Keepers, and views of those who hold differing beliefs.[2] These are backgrounds that are likely to influence how jurors will view the evidence in this case.

The defendants moved for change of venue in *U.S. v. Rhodes*, fearing that it would be impossible to find a fair and impartial jury in Washington, D.C. — but the judge denied such motions, stating that all empaneled jurors agreed they could be fair and impartial and had no real opinion of the Oath Keepers or the Jan. 6 incident.[3]

This is not to say that they will, in actuality, be impartial, however. Courts often fail to recognize the unconscious nature of human decision making and desire to please the court. Jurors believe they can be impartial and fair, as no one wants to admit their biases may make them unfair.

But despite such promises, jurors are only human. The defense has good reason to believe the jury may be biased, despite their promises to the contrary.

In opening statements, the prosecution showed inflammatory texts and video among the Oath Keepers to persuade jurors that the defendants' intent was malicious.[4] Their hope is to incite jurors to believe that there is no possibility that these statements were made innocently or without action behind them.

However, juror biases — whether conscious or not — will affect the degree to which this argument is accepted and built upon throughout trial, or dismissed as being contrary to their existing beliefs.

As for the viewing public, no amount of evidence presented at trial is likely to persuade either side that they are wrong. Rather, the two are likely to become more polarized and entrenched in their beliefs.

Facts, therefore, are less important than one might think. Often, it's the story we tell about the facts that determines which way jurors lean.

Part of the job of an advocate is to frame the case with juror beliefs in mind, but this framing must start early. As soon as jurors enter the courtroom, they look for clues about who is wrong. They know their job is to judge, so they start early. Which attorney is more polite and likable? Is the plaintiff squirming in her seat? Perhaps she's not that hurt. Is the defendant talking frantically to his attorney? Maybe he's hiding something.

When you start your mini-opening and voir dire, jurors process the case facts and create a story framework. Importantly, every future piece of evidence fits into that building framework.

If a fact goes against the story jurors have begun formulating, the jurors will do one of two things with it: (1) Dismiss the fact altogether, or (2) distort the fact so that it fits within their framework. This process is called confirmation bias.

If the fact fits within their framework, they will accept it and strengthen their beliefs in the story they are creating. As this story web builds, it becomes more robust and fortified. At some point fairly early on, most jurors become so devoted to their beliefs about the case that no fact can convince them otherwise. Rather, evidence to the contrary further strengthens their beliefs.

Take the example of end-of-days cults. Outsiders have infiltrated these cults to answer the question: What happens when the projected date of apocalypse comes and goes, and the earth and all life on it continue to exist? Will the cult followers return to their lives and proclaim they were wrong? Their beliefs will have been definitively proven false.

In "Black Box Thinking," Matthew Syed recounts the anecdote of a doomsday cult who believed a Minnesota housewife's prophecy that the world would end on Dec. 21, 1954. What happened when Dec. 21 came and went, however, is astounding, though predictable. The cult followers became even more entrenched in their beliefs when the date passed.

They twisted the fact of life on earth continuing to exist into a proclamation that their faith in the cult is what saved the world, and that they had to continue their practices, or the world will certainly come to an end.[5]

We see this in focus groups and mock trials constantly. Jurors who hear the same evidence and facts use them to prove opposite positions. Often, jurors forget some evidence entirely and, when confronted with it, say, "Oh, well, I still believe the plaintiff was partly at fault because X, Y and Z."

They will justify their position at all costs. It's simply human nature.

So, what does this mean for voir dire and opening statements? It means that the story you tell early on will very likely persist and strengthen throughout trial.

If you tell a story that speaks to your jurors, taking into account their beliefs and attitudes — which you can find out through focus groups and mock trials — you can start to weave the web of their mental schema.

If your story is incomplete, unconvincing, contradictory to their beliefs or has too many holes, your opponent will shape the story your jurors hear.

You must win jurors over by the end of opening to avoid having an uphill battle in winning them over later. The further into trial you are, the less chance you have of pulling them to your side, because evidence compounds and strengthens the story framework they are already creating.

In jury selection, there is a difficult balance to strike. If you advocate too early or ask questions designed to indoctrinate jurors, this can backfire, especially on the plaintiff's side.

Jurors are skeptical of trial attorneys and believe you are there to lie, cheat and steal your way to a verdict. Asking indoctrinating questions only plays into their skepticism.

Suppose you push your case in voir dire. In doing so, you miss the opportunity to present jurors with the worst facts and hear an open and honest discussion about juror beliefs and attitudes. You need this dialogue to determine which jurors to strike.

You must discuss your worst facts in voir dire to reveal the attitudes that will be the basis for your deselection process. How, then, can you positively influence the story jurors create while discussing the warts in your case?

Some of the story formation revolves around you, and the trust or distrust jurors have in you as a leader and purveyor of information. If jurors view you as likable, honest and

trustworthy, they will more easily adopt the evidence and arguments you present throughout trial.

Part of earning jurors' trust is learning to be present with them and talk to each one with genuine interest and respect, regardless of their viewpoints. In being honest about the issues in your case, you further gain jurors' trust.

However, voir dire should not revolve solely around the problematic aspects of your case. There are ways to ask questions that project your theme while learning about jurors.

For example, a plaintiff's attorney might ask about juror experiences with medical professionals in a medical malpractice case. Have they ever had a doctor who brushed off their concerns or missed something important? How did that affect the juror? By asking these questions, the attorney learns about the juror, yet has implanted a theme that the doctor, in this case, missed something vital.

Perhaps the juror was unaffected by the doctor's lapse in judgment and felt it was on them as the patient to find another doctor. Or perhaps they suffered damage due to the doctor's misdiagnosis and harbor resentment for it. Their answer is just as important as the question itself.

By the end of voir dire, if you have endeared yourself to the jury, elicited honest responses, and discussed issues in your case, you are well on your way to shaping the story jurors formulate.

As you move into your opening statement, your goals should be to maintain the trust you have earned and tell a story that jurors are likely to adopt. To accomplish this, you need to determine what the focus of your story should be.

Do you want jurors focused on what your client did? If so, your client should be in the spotlight of the story. Do you want jurors focused on what the other party did? Then set the stage around the actions of your opposing party, and avoid mentioning your client until later in the opening.

Jurors can only focus on the information you put in front of them. They will look to find fault with whatever evidence is presented, as they know they are tasked with doing so.

The story you tell will drastically affect the evidence jurors accept or deny as the trial continues. As you tell your story, you need to maintain juror trust.

One way of doing this is to be conscious of using a neutral tone and assuming the role of purveyor of information. Allow jurors to come to conclusions. Humans hold much tighter to beliefs they form on their own.

Are the company representatives lying? Don't call them liars; present the information and allow jurors to conclude they are liars.

Is your client giving and kind? Don't tell the jurors; show them and let them come to that conclusion themselves.

By the end of the opening, jurors should like and trust you, have a solid foundation of the case themes, and be leaning in your favor.

You have a rare opportunity at the start of the trial to influence the rest of it. If you take the time to be deliberate in your voir dire and opening statement, the effects will compound as you present evidence, and you will significantly increase your chances of winning.

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[1] <https://www.pewresearch.org/fact-tank/2022/01/04/a-look-back-at-americans-reactions-to-the-jan-6-riot-at-the-u-s-capitol/>.

[2] <https://www.npr.org/2022/10/03/1126576420/oath-keepers-sectitious-conspiracy-jan-6-trial-opening-statements>.

[3] <https://lawandcrime.com/oath-keepers-jan-6-trial/staving-off-courtroom-chaos-judge-rejects-oath-keepers-last-ditch-request-for-jan-6-sectitious-conspiracy-bench-trial/>.

[4] <https://www.npr.org/2022/10/03/1126576420/oath-keepers-sectitious-conspiracy-jan-6-trial-opening-statements>.

[5] Syed, Matthew. Black Box Thinking. Matthew Syed Consulting Limited, 2015; P.79-80.