



OPENING STATEMENTS

*Winning in the Beginning by
Winning the Beginning*

Dominic J. Gianna
Lisa A. Marcy

2012-2013 EDITION

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About the Author

Dominic J. Gianna, founding partner of Middleberg, Riddle & Gianna (New Orleans & Dallas) is a Fellow of the International Society of Barristers recognized both as a master trial advocate and as one of America's most dynamic and inspired teachers of the arts of advocacy, persuasion and trial techniques. He has led over 500 seminars throughout the English speaking world, training thousands of lawyers to be powerful trial advocates and has received numerous awards for his contributions to the profession, including the National Institute for Trial Advocacy's Keeton Award. He serves as a member of the national faculty of the National Institute for Trial Advocacy and as Program Director of NITA's Gulf Coast Trial Advocacy and Deposition Training Programs.

As a trial lawyer, he has tried cases throughout the country from both sides of the courtroom in the areas of products liability, toxic tort, mass class actions, commercial matters and employment discrimination cases. His career as a trial lawyer has been balanced with experience as a trial judge ad hoc and as an appointed Special Master, arbitrator and mediator in both state and federal courts involving complex matters. He has served as a commentator for Court TV and is a frequent television commentator on legal matters. Gianna's opening statements are legendary. He has been consulted by lawyers throughout the USA to assist them in the creation of their opening statements. He serves as Director of the Louisiana State University Trial Advocacy Training Program, and has taught advocacy as a principal faculty member of The Professional Education Group, Inc. throughout the English-speaking world. He has his B.S. degree from Manhattan College, his M.S. degree in chemistry from SUNY at Buffalo and his J.D. degree from Loyola University School of Law, where he served as Editor-in-Chief of the law review.

Lisa A. Marcy, founder of the Marcy Law Firm in Salt Lake City, Utah, is recognized both as one of America's great trial advocates and as one of the country's most creative and

inspired teachers of advocacy, persuasion, and trial techniques. She has tried cases from both sides of the courtroom and has been involved in prominent cases that have shaped employment, mental and medical health and hospitality law. Her practice has ranged from the practice of disability law to the prosecution and defense of major commercial, employment and tort litigation. She has pursued her career as a trial lawyer while raising three energetic and dynamic daughters.

Marcy has taught and led seminars throughout the USA as a principal faculty member of The Professional Education Group, Inc., and as a Program Leader and national faculty member for the National Institute for Trial Advocacy Trial and Deposition training programs. She serves as Program Leader of the Louisiana State University School of Law Trial Advocacy Program and has published in the areas of trial persuasion and opening statements. She is a frequent guest on a radio show, often lectures to groups of business women and is in demand for her dynamic and unique training programs designed to motivate and empower women professionals.

Marcy received her undergraduate degree from Hamilton College and her law degree from the University of Utah. She is active in many civic and professional organizations.

Gianna and Marcy's multimedia trial seminars have been rated by their colleagues as some of the best trial advocacy and persuasion seminars ever presented to the organized bar. Their unbridled enthusiasm for the arts of advocacy and persuasion and their lively and entertaining interaction has led seminar attendees to call them the "Sonny and Cher" of the legal profession.

Acknowledgment

To Greg Bell, our talented, creative and ever patient editor for his great advice and encouragement.

To Diane Abraham for her unflappable good cheer, patience and meticulous good work.

To Rachel, Kelsey and Shannon, for their inspiration.

And, to each other, for the mutual understanding, support, teamwork, smiles—and tolerance!

Tribute to Alfred Julien

Alfred Julien, the author of the first “Opening Statements,” was one of America’s great trial lawyers. His openings were legend. I tell a story about him in my seminars. That story illuminates the purpose behind this book.

Julien was one of New York’s great trial lawyers, mainly from the plaintiff’s side. One day, he was trying a serious injury case in New York City. In civil cases in New York City courts, counsel participate in voir dire without benefit of a judge. And, as sometimes happens, on that day the voir dire process started and ended late. The jury was selected. Julien and his opponent talked to the court, but on that day, that judge was quite busy. More delay in starting. The judge took the bench, Julien, the master of openings, gave a brilliant opening statement. His opponent followed.

The lunch recess was called. The court took a very long lunch recess. Counsel returned. The judge was occupied with another matter in chambers. The jurors all of this time had been closeted in the jury deliberation room adjacent to the courtroom. At 3:30 p.m., everyone was in the courtroom still waiting for the judge. Then came a loud knock on the door from inside the jury room. The bailiff went to the door, opened the door, and there stood one of the jurors. He proudly announced “I am the foreman—we have reached a verdict!”

Does that happen? Can that happen?

That is what this book is all about.

Introduction

You stand before 12 (or 6 or 9) strangers. Diverse in race, gender and most of all, age! The Seniors stare at you through their bifocals. The Baby Boomers look at you with obvious distrust in their eyes. Those Generation X jurors tell you with their arms folded to get on with whatever this trial is going to be about right now. The very young looking Generation Y's glance at you, but are really looking fondly at their Smart Phones, eager to text their way out of what already is lasting too long!

How do I communicate with all of them? How do I persuade this diverse group of people? Can I keep their interest in me and my case? What are they thinking? What are their attitudes, their beliefs, their values? How do I create a trial that engages their interest and moves their hearts? How do I make them care? How do I capture the core interests of such a diverse and divergent group of human beings, all angry at being there, all who look suspiciously at me?

Most of all—can I turn them to think my way, can I really and truly, win my case in the beginning?

These are the questions and the obstacles all trial lawyers face in the multi-generational courtroom of today. This enhanced new edition of *Opening Statements: Winning in the Beginning by Winning the Beginning*, in a new format, answers all of those questions. From understanding how today's multi-generational jurors think and decide, to creating powerful trial stories and visceral trial themes that motivate these jurors to vote your way, this book has it all. But most of all, this book will help you sway today's jury in your favor—at the very beginning.

Welcome to the courtroom of the generations. Advocacy for the Ages is what it is all about.

Dominic J. Gianna and Lisa A. Marcy

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A Touch of Persuasion . . . from Aristotle and Cicero, to Mauet, Anthony and Plotkin

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§ 1:1 Persuasion: The silent art

“ . . . for it is in the power over the emotions that the life and the soul of oratory is to be found.”—Aristotle

The art and the science of persuasion, the techniques of advocacy, come to us today from the ancient past. The Greek and Roman empires produced great actors, great orators, great philosophers, great rhetoricians and great advocates.

Persuasion is the ability to get what we want. A persuasive communication facilitates getting what we want by motivating the listener to act on our behalf. It is the silent art. The persuader slips into the listener’s mind and heart quietly, stealthily. The persuader listens to the listener’s inner core. Persuasion is not talking. Persuasion is not arguing. Persuasion is listening first, talking second.

Persuasion is not directing the listener to do anything.

Persuasion comes from the inside. All human beings have inner messages that play over and over in our minds. The art of persuasion is the ability to first, find those messages and second, convince the listener that the message being sent is the message inside the listener. Only then can persuasion happen.

A persuasive communication, as Cicero wrote centuries ago, “*engages the mind and moves the heart.*” A persuasive communication triggers a positive response in the listener’s mind, heart and soul. A persuasive communication matches, on all fours, the message inside the listener’s mind—and heart. The modern persuader, knows that a persuasive message must be delivered in story form, must facilitate insight, and must generate the “rush” we all get when we comprehend the message when we “get it.”

In this book, we will explore the most important message, the message sent in the beginning. But first, a touch of persuasion. Professor Thomas A. Mauet, the author of *Trials*,¹ tells us that the modern concepts of persuasion can be distilled into six principles of persuasion: 1) *think like a juror*, 2) select a theory of the case, 3) select the trial vocabulary: themes and labels, 4) focus on the people, not the problem, 5) use storytelling principles, 6) focus on the key disputed issues, 7) be an advocate. This advice from a modern master of persuasion, is perfectly consistent with the teachings of the ancient masters.

The First Masters

Perhaps the first great advocacy teachers were Aristotle and Quintillian. Here, in a nutshell, is the essence of the teachings of Aristotle and Quintillian on the art of advocacy:

1. Aristotle stressed the importance of knowing one’s audience. He said that an advocate must understand human nature and must know how listeners think, their habits, desires and emotions. Aristotle was a student of people. He studied their habits, studied their non-verbal communication, learned their speech habits and could even mimic the reactions of his audience. He, indeed, was the first great student of psychology and neuro-linguistics.

[Section 1:1]

¹Mauet, *Trials* 2d (Aspen 2010).