

The Opening Statement and Its Power of Persuasion

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I. INTRODUCTION

In truth, the opening statement is perhaps the most important stage of the trial, especially if you represent the plaintiff. An effective opening statement can and will persuade the jury. It should be your goal to persuade during opening statement. There is nothing wrong with this. This persuasion can occur within the bounds of ethics and within the particular fact situation involved.

The Importance of the first impression cannot be overstated. It is a fact that human beings usually believe that which they have heard first about a given subject. Studies have shown that 80 percent of jurors make up their mind during opening statement. Therefore, the time provided for opening statement should not be wasted. Start strong. Your purpose should be to persuade from the first sentence and, at the same time, outline the evidence to be presented.

II. THE PURPOSE OF OPENING STATEMENT

While there are many goals that we wish to accomplish during opening statement, the following are the most important:

A. It should be your primary goal to persuade the jury.

1. Be creative at the beginning of your opening statement
2. Be creative with the use of statistics, learned treatises, and visuals.

B. Establish a theme. You should establish the theme of your case in opening statement and build upon that theme during the trial. If your case involves simple carelessness or negligence by a defendant, your damage theme should be that of compensation as opposed to punishment. On the other hand, if your case involves reckless or wanton conduct, but small damages, your theme should be one of punishment or, even better, prevention. Your theme must "ring true" to the jury. In order to accomplish this, you must develop your theme with the following in mind:

1. Your theme should be a message carefully crafted from the beginning of the case and further developed throughout the discovery process, from interrogatories to depositions to voir dire to the opening statement and ultimately the closing argument;
2. Your theme should be woven into the fabric of your case and wrapped around the jury throughout the trial process. Introduce your theme in voir dire; punctuate your opening

statement repeatedly with your theme; subtly reference your theme during the trial process; and finally, the exclamation point of your closing argument should be your theme;

3. You must believe in your theme in order to persuade the jury to believe in your theme;
4. Your theme should reflect the message of your story;
5. It should be consistent with the facts of your story;
6. Your theme should have emotional appeal as well as intellectual appeal;
7. Your theme must be compatible with the belief system of the jurors;
8. Your theme should be attractive to the interests of the jury and should motivate them to do what they perceive to be the right thing for the greater good;
9. Your theme should gently lead the jury to your conclusion, but allow them to find it for themselves; and lastly,
10. Your theme must allow the jury to accept your theme while remaining true to the legal framework that they must ultimately follow.

C. Tell the jury in clear and concise language what the case is about and what you are asking them to do.

D. "Take away" the defendant's bombshells. The plaintiff's attorney should openly discuss the defenses that have been put forth by the defendant. He or she should also discuss any weaknesses or problem areas in the case and the plaintiff's answers to those weaknesses. This will minimize the effect of opposing counsel's opening statement — when he talks about the weaknesses in the case the jury has already heard it. Also, plaintiff's counsel will begin to establish credibility by being open with the jury.

E. Establish credibility. The jury must feel like they can believe you before they will vote for your client. Credibility is established in many ways.

1. Demeanor.
2. Never overstate.
3. Never exaggerate
4. Explain or minimize weaknesses.

F. Your opening statement should serve as an outline or foundation for closing argument.

G. The opening statement should serve as the attorney's promise to the jury and begin a bonding process to be capitalized on during closing argument.

III. YOUR CLIENT HAS A STORY TO BE TOLD — TELL IT

The opening statement is the optimal time to tell your client's story. It is an opportunity to prime the jury to favorably accept and perceive the information and evidence you will give them throughout the trial. Do not underestimate the lasting impact an opening statement leaves behind...whether positive or negative. If done right, an opening statement that also tells a compelling story will leave a lasting inclination to the acceptance and affirmation of your theme.

Although not everyone is a great storyteller, following a few basic principles of effective storytelling can enable anyone to tell their client's story in an effective persuasive manner.

1. Choose carefully where to begin your story. You must start out strong in order to keep the jury's interest and inspire them to pay attention for the remainder of your story. You do not have to start at the beginning. If it is more effective, you can start with the injury. You can begin the story anywhere as long as the beginning grabs the attention of the jury.
2. Tell your client's story in the present tense and in active voice. Present tense is always more persuasive. Jurors care about what they perceive to be happening now. They need to be brought in to

the story as it is unfolding in the present tense. Active voice is more persuasive, more dynamic and generally easier to follow because active voice is more direct than passive voice.

3. Don't forget the details. Description and details make a story come alive. In order to have the details available to you in opening statement, you would had to have obtained them during discovery, so it is important to start planning your opening statement when you first meet the clients. As we all know, memories fade and vital details can be lost over time. You should utilize details in an efficient manner; you don't want to overload the jury. But, you do want to bring them in to the story. You should use details and description to appeal to all the senses. Your goal should be to enable the jury to experience the story through the eyes of a participant in the story, the wife or husband of the deceased, the sister or brother or perhaps the son or daughter, anyone that the jury can identify and sympathize with. This is a powerful tool and can be done with effective use of description and details and within the bounds of ethics.
4. Focus on your most persuasive facts. However, keep in mind that what is most important about your facts is how the jury perceives your facts. The facts should be those that are undisputed; this will help build your credibility with the jury. Jurors want you to provide

them with the facts they need to draw their own conclusions. With strong undisputed facts in the context of a compelling story, you can lead jurors to the conclusion you need in your case while allowing them to make up their own minds and reach the conclusion on their own.

5. Understand your audience. This can not be stressed enough. Juries are a group of independent thinkers, each with their own life experiences, values, belief systems and sense of right and wrong. They have been summoned to the court to listen to your case, a case they are not personally involved with and have no actual vested interest in the outcome. While they did not choose to be a juror, they do take their responsibility seriously and want to "do the right thing." Jurors are first and foremost human beings and it is human nature to take the path of least resistance. Therefore, you should present your case through facts and storytelling in such a way as to create a path that is easy for the jury to follow. To accomplish this, you must understand that the previously mentioned life experiences, biases and belief systems of the jurors serve as internal filters from which they process the facts and information you provide. The information you provide only makes sense to them if it fits or is consistent with their belief systems....their internal filters. Simply put, if you have appealed to the jury or perhaps even

persuaded the jury with your story and your theme, they will be more likely allow the facts and evidence to flow freely through their internal filters. For this reason, you should attempt to bring your story, your theme to the jury while being mindful of their potential biases and belief systems. It is easier to persuade them by making your facts fit into their belief systems than to attempt to make them fit their belief systems and biases with your facts.

6. The purpose of your story is not to simply provide information. The purpose is to communicate your message — your theme. Like a deposition, an opening statement is a dynamic process. You are the messenger who must persuasively deliver a message to the listener (the jury). This is a dynamic process. Your method of delivery, your voice, your mannerisms, your facial expressions and much more all impact the message. As you deliver your message, your opening statement, make eye contact with the jury, with each juror. Let them look you in the eye. While you are reading them, they are reading you. They are deciding whether or not you are credible, whether or not your story is true, whether or not your story fits into their belief system. As you get a reading on the jurors, you respond to that reading and they sense it. They respond to you just as you respond to them. Opening statement is an opportunity to make a connection with the jurors through the dynamic process of

communication.

III. DISCUSSING DAMAGES DURING OPENING STATEMENT

Some believe that it is a mistake to discuss damages during opening statement. Almost every opening statement outline provided to trial advocacy students in law school places the discussion of damages at the end and minimizes its importance. Of course, an attorney cannot make damages a central theme of the case if the damages are slight. However, if significant and real damages are involved, they should be discussed in great detail during opening statement - as much as allowed.

- A. Discuss the amount of the prayer or a range with the jury during opening statement. How often are you asked: "How much did you sue for?"
- B. Do not hesitate to discuss injuries that are significant and supportable.
- C. Chart all items and elements of damages for effective use.
- D. The "specials" approach should be rejected by the trial lawyer.

IV. PRACTICAL SUGGESTIONS

- A. Keep your promise.
- B. Do not "hold back". Some fine trial attorneys feel that certain strong evidence or surprise evidence should be "held back" during the opening statement and allowed to unfold for the first time during trial. This is usually a mistake. Remember, the jury will be most receptive and attentive during the

opening statement. Do not waste this time! If you have strong evidence or “smoking guns” tell the jury about it during opening statement. Remember the concepts of primacy and recency.

C. Use demonstrative evidence. It is often said that a picture is worth a thousand words. Effective visual aids, models, and Power Point should be used during opening statement, especially in highly technical and/or product liability cases. Also, if discovery has produced damaging documents from the defendant’s own files, these should be enlarged and shown to the jury if allowed.

D. Organize your argument. While it is not a good idea to use extensive notes during opening statement, the content of the opening statement should be well thought out and organized. It may be a good idea to write down one or two word descriptions of the areas that you wish to cover on a note pad and place that pad on an adjacent table for casual reference. It is impossible to accomplish the necessary goals of opening statement without having an organized presentation. Remember, your goals are to establish a theme, persuade, explain what the case is about, address and discuss weaknesses and defenses, establish credibility, and make a promise to begin the bonding process. Little or none of this will be accomplished through a haphazard, poorly organized opening statement. Consider the opening statement to be the most important stage of the trial and spend the time necessary to properly organize the statement.

E. Make the jury feel special. A portion of the opening statement should be used to convince the jury that they are special and that they will be deciding a

case of significance. If internal documents that are subject to a protective order will be placed into evidence, the jury should be advised of this. For example, you may wish to tell the jury that their eyes will be the first and only eyes to see certain confidential documents that have been hidden away in the defendant's confidential files for years and years.

F. Simplify your case.

G. Never try the entire case on one issue (unless you cannot lose the issue and have no other choice).

H. Keep summation in mind when presenting the opening statement.

I. Explain how the case got to court, what a deposition is, and how you can be so confident about the evidence.

J. Admit evidence that will be harmful. If there are contradictions in the evidence that are not relevant to the outcome, this should be explained and described as smoke screens or red herrings.

K. If multiple defendants are involved, let the jurors know of any finger pointing between the defendants.

L. Do not try to be funny.

M. Do not exaggerate your case or overstate facts.

N. Do not go through the testimony of each and every witness - hit highlights.

O. Use your own style but do so with credibility.

P. Be sincere and trustworthy.

Q. If rebuttal is allowed -- how to handle.

R. If technical and boring testimony will be introduced, tell the jury why it is necessary to do so and what to expect. Example - Depositions.

S. Do not ramble.

T. Tell the judge what demonstrative evidence you plan to use in opening statement. Nothing can be more disruptive or have an adverse effect on integrity and credibility than being interrupted by the judge and reprimanded during opening statement.

U. Know your judge. Take steps to determine what perimeters a given judge will place on your opening statement.

V. Do not use cliches or law school trial advocacy phrases. We have all heard them. Examples are, "what I tell you is not evidence," or "listen to all of the evidence before you make a decision," or "I want to thank you in advance for your time that you have taken to serve on this jury," etc. Hopefully, the opposition will use all of these, and more, during opening statement.

W. If you are uncertain about the content of certain testimony, be flexible and do not paint yourself into a corner.

X. The method of delivery should be considered. The jury will not necessarily believe the one who speaks the loudest. Understatement is often the most effective tool of persuasion. Also, silence produced by way of dramatic pauses can have greater impact than words. In other words, be yourself but consider the effect of sincerity, eye contact, understatement, dramatic pauses,

etc., as opposed to shouting and fist banging.

Y. Do not be afraid to discuss empathy for the defendant. Example - witnesses who were themselves victims; or an individual defendant.