



International Association of Defense Counsel

Trial Academy

Opening Statement – The Art of Storytelling

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Introduction

The Opening Statement is the story of your case presented as a prologue to the presentation of evidence. After weeks, months or years of interviewing witnesses, inspecting the scene of an accident, pouring over documents and analyzing case law and jury instructions, you weave together all the strands of facts, opinions and impressions into a simple story.

Just as a prologue to a play conveys the story of what is to come, the Opening Statement gives the jury a context within which to receive and apply the testimony and documentary evidence that you will present. A juror who understands your story is more likely to know what to look for and know what is important, as the juror listens to testimony and inspects exhibits. You do not need to be a spellbinding storyteller in order to be a successful trial lawyer. You do need to be able to transform a notebook full of facts into a simple story with a theme that you believe and that is consistent with the common experience of ordinary people.

The Opening Statement should be understated not argumentative. It is a preview that tells the jury what to expect, which witnesses are particularly important and what exhibits they should pay special attention to. By telling them who they will hear, what documents they will see, and why these exhibits and the testimony of these witnesses are important, the jury will be engaged and often eager to see and hear from the people you have described.

Preparing For Your Opening Statement

If the Opening Statement is the story of your case, the witnesses and the exhibits are the actors and the props through whom your story will be told. From initial

disclosures through the final trial prep conference, you should examine the information you have about all of the witnesses that you and your opponent have identified as “will call” and “may call” witnesses. Review the information that you have in your witness files and in depositions as to each individual witness and determine what significant facts or impressions that witness can add. What does he or she know, how confident or tentative will that witness be? Are your client’s facts central to an understanding of the issues in the case, *e.g.* of a doctor in medical malpractice case, one of the parties to a contract in a breach of contract case.

Prepare notes with phrases that describe your client, the way he or she makes decisions, his or her background or training and personality to establish credibility with the jury. Consider which witnesses will have information that you want to address specifically in your Opening Statement. Note which witnesses are critical players with an overall perspective and which will offer some important details. For each witness jot down several key words that describe the witness’ role in the cast of characters and what you expect the witness to tell the jury.

You do not need to mention by name all of the witnesses you intend to call. If you are not certain if you will call a witness during trial because of the potential for cumulative evidence, because of time constraints, or because the content of a witness’ testimony may outweigh the potential value of that witness’ testimony, do not mention that witness by name in your Opening Statement.

Be careful about identifying specific quotes with witnesses unless you are absolutely certain that the witness will in fact use the same language in his or her testimony. If you know that a witness will deny using the specific language that you

want to highlight, but his or her testimony will be contradicted by other witnesses who will testify, tell the jury “Mr. Jones may testify that he did not cuss or use vulgar comments toward my client, Mr. Smith, but you should pay careful attention to the testimony of Nancy Williams and Frank Wallace.” An effective technique in Opening is to ask the jury to “be sure to listen to” the testimony of a specific witness whose description of certain events you want the jury to focus on.

If the jury will hear from expert witnesses, whether treating or retained, whose testimony you want to emphasize, tell the jury what to pay attention to, what they should listen carefully to, what not to miss. Explain what the expert’s role is and use simple language in describing the expertise he or she brings.

Stipulated exhibits are an extremely significant tool as you prepare your Opening Statement. First, they can serve as visual aids for the jury. In addition, stipulated exhibits can provide an outline that you can rely on for an orderly presentation of your Opening Statement without having to resort to extensive notes.

In preparing for your Opening, anticipate potential objections to testimony and to exhibits. If you expect your opponent to challenge a certain area of testimony or challenge the admissibility of documents, you will prepare to counter those objections during the course of the trial. Do not base your Opening Statement on testimony or exhibits that may not be admissible. If the judge at a final trial preparation conference does not rule on or address issues raised in motions *in limine* or pre-trial objections by your opponent, be careful about referring to any such testimony or exhibits during the course of your Opening Statement as you may draw an objection. Even if there is no objection during Opening Statement, if the evidence is not admitted during the trial, you

will have overstated your case and given the jury the impression that you did not deliver all that you promised.

We often think of exhibits as documents; however, exhibits can also include photographs, tools, medical instruments, construction materials, *etc.* To the extent that an object rather than a document is at the heart of your case, be prepared to use that object or its representation in your Opening so the jurors have an image that will help them understand what the case is about.

Consider how you can give a context to your story. The important point is to set the scene so that the jury understands from you what happened, who was involved, why there is a dispute and what they are being asked to do. For example, in a wrongful termination case, describe what the employer's business is. Often the name of a business does not represent what services the business performs or what products it produces or sells. Tell the jurors about the company, how many employees it has, what role the key employee witnesses play, *etc.* Describe what they do rather than simply expecting the jury to understand their role by the title they hold.

If the case involves an accident, you will, of course, want to describe where the accident occurred. Remember that individual jurors may not be familiar with the specific location, particularly if you are in federal court as opposed to a circuit or district court in which the jurors will most likely be residents of the community in which the accident occurred. While you will know the facts of your case intimately and can easily imagine and describe a bicyclist going northbound on Spruce Street as it intersects Jefferson, the jurors will not have the same familiarity with the location, let alone the facts as you know

them, and will relate better to a diagram of the scene of the accident than a verbal description.

As you prepare, even if you recognize that you may not have a specific exhibit that sets the scene, consider how you can create and use a diagram, a timeline or calendar, computer technology, an anatomical representation, or a model to explain a concept in simple terms. Make your diagram, timeline or other demonstrative exhibit objective, a tool to aid your advocacy, not an object of advocacy itself. The jury will appreciate the assistance that you provide. In addition, you may find that you and your opponent will continue to rely on and use this demonstrative exhibit as you examine witnesses throughout the trial.

For this reason, it is important to consider well in advance of the trial what visual aid could best illustrate the points that you are trying to make in your Opening. Review the judge's procedures or ask what his or her procedures are for use of demonstrative exhibits during Opening and whether they must be shown in advance to opposing counsel. If they are allowed, decide whether you and your client would be best served by a demonstrative exhibit that would be prepared before trial for use in the Opening or by a drawing or diagram that you create in front of the jury during your Opening Statement. If you choose the latter approach, it is critical that you carefully prepare and rehearse creating the diagram so that you are very comfortable drawing, writing or making it in front of the jury.

Obviously, computer technology will need to be considered well in advance of the trial and carefully prepared and rehearsed so that you and any assistant will be comfortable with the technology and can use it efficiently and effectively. Review the

pre-trial procedures of the courtroom in which you will try the case. Learn the technology available in that courtroom and sign up for training on any equipment with which you are not familiar. Ask court personnel if all of the courtrooms in that courthouse are equipped with the same technology. If not, be prepared in case your lawsuit is transferred to a courtroom without the technology you intended to use. Have back-up hard copies of exhibits that you can put on an easel or use on an ELMO if the courtroom is not “high tech” or if the technology is not working properly.

If the witnesses and exhibits are the actors and the props in your Opening Statement, you must still have a theme for the story of your case to be compelling. Because witnesses may have to testify in an order that is neither logical nor chronological and because exhibits may be introduced or addressed in a seemingly random manner, the Opening should give the jury a preview of what will come and how the story of your case makes sense. As with the prologue to a play, the Opening is an introduction to what is to come. The theme is the essence of the story, *i.e.* the topic, the melody, the refrain, the thesis.

From the time that you start working on a case, consider what its themes are: Is it a case about a breach of trust; a failure to take responsibility; an unavoidable accident; a weighing of competing interests; revenge; greed; a tragic mistake; a misunderstanding; a random and unpredictable event? Think about how you describe the case when you talk with a friend or your partner. Try to come up with a sentence or two that will define or summarize the essence of your case. If you had to write a headline or a lead paragraph for a newspaper article or television show about your case, what would it be?

Look at the jury instructions at the beginning of your case to see what the elements of the claims and the defenses are, not just for motions practice, but to help you identify strengths and weaknesses in the evidence for each side. These can help you identify subplots and also address rebuttals (defenses) to the claims that plaintiff's counsel will make in Opening.

Compose your story. Use words that create pictures – action verbs, adjectives and other image words. For an accident, set the scene with words that describe the weather conditions, road surface, obstructions or distractions (low hanging tree limbs, intense sunshine, *etc.*), traffic controls, time of day (*e.g.* rush-hour, late at night), unusual conditions, road congestion or construction, *etc.* However, do not clutter the essential facts with information that distracts from your point.

In a breach of contract or employment case, the “events” at the heart of the dispute may be less dramatic than in an accident, but you can again convey the significance or insignificance of conversations and meetings by setting the scene. For example, is the critical conversation one that lasted less than a minute when the boss poked her head in the door as she was leaving for lunch or was it during a presentation in a meeting room full of potential customers?

Use words that are common for regular conversation to describe people and events. Avoid legalese, except to the extent that certain words define elements of your case, *e.g.* substantial performance, adverse employment action, assumption of risk, *etc.* Obviously, you do not want to be condescending. Use words that are easily understood, not the same words that you might use in an oral argument before an appellate court.

Think *People Magazine* or *US Today*, not *The Economist*, the *Wall Street Journal* or the *New York Times*.

Introduce the concepts of burden of proof, credibility of witnesses, and causation in a simple way. Tell the jury that they will have to decide what happened and who to believe.

Rehearse Your Opening

After you compose your Opening Statement, practice it, using your exhibits and any charts, objects or other visual aids you need for illustration. Give your Opening Statement to your spouse or to a friend who is not a lawyer. What questions do they ask you? Does your “story” make sense to them? If they do not understand or agree with you, when they have not yet heard the other side’s Opening, find out what they need to know for it to make sense, for them to find your client’s cause compelling. Then tell the jury “what you will hear,” “what you will know,” “what the evidence will show” from your client about the event or transaction that is at the heart of the case.

Prepare yourself and your client for the emotion and attacks that will often characterize a plaintiff’s Opening. Prepare yourself emotionally to show no reaction to surprising negative statements in Opening as well as in later testimony and prepare yourself intellectually by anticipating areas that you think opposing counsel will target. Be ready with words to diffuse the characterization and to redirect the jury’s attention. Know what the weaknesses are in your case and consider how to be honest in describing a situation or conversation so that you can minimize its impact when it is described in testimony or through exhibits. If certain exhibits are harmful to your client and these

exhibits are stipulated, be prepared for your opponent to refer to them in Opening. Know in advance what you will say to mitigate or explain.

Presenting your Opening Statement: Telling the Story

You will likely be nervous before you give your Opening Statement and may have ‘butterflies’ or feel the adrenaline rush through you. Take a deep breath and settle yourself before you begin. Make sure that your notes and any exhibits you want to refer to are in the order that you want before you step to the podium. If you know that you talk too fast when you are nervous, write ‘SLOW DOWN’ at the top of your notes or use some method to remind yourself to speak slowly.

If your opponent has given an Opening Statement and used any demonstrative exhibits or written on an easel or flip chart, remove those from the jury’s sight before you begin your Opening. If you have an exhibit to place in front of the jury, know whether you want to position the exhibit before you begin or whether it is something you will place during your Opening. If you place it before you begin, you will lose the attention of some jurors who will look at or read the exhibit rather than listen to you.

If you have a time limit for Opening Statements, decide how you will monitor your time. If you have practiced, you should have a good idea how long Opening will take. If you run close to the time limit set by the judge when practicing your argument, be mindful of the time so that the judge does not interrupt you for exceeding the limits.

Know what your first words will be. Memorize your opening sentences. “Ladies and Gentlemen, this is a case about . . .” Do not begin your Opening Statement with an explanation about the purpose of an Opening Statement or words to that effect. In many jurisdictions the judge will have read the stock instructions that tell the jury what an

Opening Statement is and that what the lawyers say is not evidence. Even if the judge has not explained what an Opening Statement is, you gain nothing by doing so. Get to the heart of your story and tell the jury what the case is about.

You do not need to preface every point with “the evidence will show” You can say, “you will hear” and begin a narrative of your story. Refer periodically to “what you will see,” “take note of,” or similar phrases so you can overcome an objection that your Opening is an argument.

Make eye contact with the jury. Don’t stare at anyone, but keep good eye contact as you speak. This is important for your credibility and because it gives you feedback about the jurors’ understanding and receptivity of your Opening. Be conversational, allowing pauses for them to absorb an important point. If you refer to a document and show it to them, give them time to read it before you start talking again.

Move away from the podium to the extent the judge allows you to do so. In some courts you are not permitted to do so, but you can still use gestures and may be able to stand near the podium rather than behind it without violating the court’s rules. Know where the microphones are in the courtroom. Know how your voice projects in the courtroom.

Before the jury is selected and outside the presence of the judge, ask the court reporter if he or she can hear you when you stand at the podium and at various positions throughout the courtroom. You may be able to accomplish this at a pretrial conference or hearing. Be friendly, courteous and professional with the court staff. They can make your life easier or, in some cases, more difficult. Some court reporters will interrupt you if they cannot hear you and if that happens you will be distracted and potentially

embarrassed, so find out if your voice needs amplification before you are giving your Opening Statement.

Use as few notes as possible. Do not read your Opening Statement. By this time in your life, if you have done any public speaking, you know what methods work best for you, that is, a full script as in a play or phrases and key words. Just because another person is effective with a different method of preparation does not mean that you should change what works for you and what makes you more comfortable when speaking to an audience.

If you have a script that you created and practiced from, highlight a few key words per page that will get you back on track if you forget what you wanted to say next. Remember that exhibits can serve as a script for you. If you do not use an actual script when you speak, but rely on key words in notes to speak more conversationally, you will still find no substitution for thorough preparation. The more times that you practice your Opening before a friend or family member, the more you can refine your choice of words and phrasing.

If you are concerned that 30 or 45 minutes will not be enough time for you to deliver your Opening, think about the attention span of the jurors and the time of day that you will be likely to give your Opening. Will Opening Statements be the last event before lunch or before the end of the trial day? If so, the jury will be grateful for a clear and concise Opening and will be even less tolerant of redundancy than at other times.

Consider, if you attend church, the customary length of a sermon or homily, approximately 20 minutes. If you can tell your story and make your points in 10 to 15 minutes rather than the 30 minutes allotted by a judge, the judge and the jury may be very

appreciative. A shorter Opening Statement reinforces the message that defense counsel often want to convey that ‘the case is really simple, plaintiff is trying to make it complicated’. If your Opening is substantially longer than that of Plaintiff’s counsel, you may undermine that message.

Be yourself. Do not try to imitate someone else or to change your personality or style. If you know your case inside and out, you will be more comfortable engaging in a conversational style as you speak to the jury. Virtually every trial has humorous moments. Sometimes those moments are at the lawyer’s expense, for example, if we phrase a question awkwardly or drop an exhibit. As long as you don’t make a practice of appearing unprepared or unorganized, give yourself permission to laugh at yourself, then get back to business. Do not force humor or try to joke. If you do, you are likely to provoke the anger of the judge and may offend the jury. Be aware of nervous habits such as, jingling coins in your pocket, clicking a pen, adjusting your glasses, checking off points in your notes, *etc.* These can be very distracting and will interfere with your message.

Opening Statement is a time for an understated presentation of the story. Do not exaggerate, do not argue. Save argument for closing. Tell the story, then ask for what you want. Close by telling the jury what you would like them to do after they hear all of the evidence. Your Opening sets the stage for the verdict you want.