

Opening Statements

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I. Introduction

The opening statement is an exercise in advocacy without argument. It requires refined knowledge of the facts of the case assembled in a manner which promotes ready comprehension. A successful opening statement is not a mere recitation of “what the evidence will show.” Rather, it is a soliloquy in the form of a story which leads the jury to the desired result by providing them with a framework to consider the evidence, providing the facts to support the result you seek and by inspiring the jurors to accept the truth of your position. Effective opening statements, like so much of trial work, are usually based on good storytelling. It is far more preferable and persuasive to tell a compelling story which leads to the conclusion you desire. A story is far easier to recall than disjointed facts. An effective opening statement which is told as a story will also provide a framework which makes the evidence memorable.

Although the importance of the opening statement is often minimized, a person’s initial impressions usually become lasting impressions. This phenomenon, which all of us have experience throughout our lives, is called the rule of primacy. People remember longest what they hear first. Thus, opening statements are of great importance. Jurors are most attentive during opening

statements, are trying hardest to understand the case, and are looking for a basis on which to make their decision.

The idea that a juror reserves judgment until the close of the case is generally a myth. Research shows that jurors take a position on the case during or just after the opening statement and that once a juror has adopted a position, it is unusual for them to change their mind based on the advocacy of the opposing party. In fact, for about 80 percent of jurors, their final verdict is based on this initial position. The reason for this is that jurors selectively perceive evidence in a way which supports their initial position. In light of these findings, one cannot lose sight of the fact that the opening statement is the best opportunity an attorney has to make his or her case.

II. The Use of Theories and Themes in Developing a Good Story

The first step in developing a successful opening statement is to identify the theory and theme of the case. The theory of the case should be expressed in a single paragraph that combines an account for the facts and the law in such a way as to lead to the conclusion that your client must win. The theme is a rhetorical device that justifies the morality of your theory and appeals to a juror's sense of justice. In short, a theory tells the jury the reason that your verdict must be entered and the theme shows why it should be entered.

A. Theory of the Case

It is crucial that you present a coherent theory of the case during opening statement. Your trial theory is the adaptation of your story to the legal issues in the case. The theory must contain a simple, logical provable account of facts which, when viewed in light of the controlling law, will lead to the conclusion that your client should win.

A good theory makes a case understandable by:

- providing a structural basis for every phase of the trial;
- simplifying and imposing discipline on the case;
- providing the “law of the case.”

1. Steps to a Winning Theory

It is often most manageable to begin to prepare for trial during, or just before completion of, discovery. Begin by developing a chronological outline of the case, allowing yourself an opportunity to fill in any missing information within the discovery cut-off dates. This chronology will allow you to develop the theory and theme of your case. Your outline should contain:

- a summary of all facts - both positive and negative;
- identification of the witnesses necessary to establish the facts essential to the case;
- a summary of all possible claims and defenses;
- identification of the required elements of any potential jury instructions;
- consideration of potential evidentiary issues which may affect your case.

This process may lead to the identification of a number of theories, including alternate theories. In determining which theory or theories will be most successful, ask yourself:

- which theory has the most factual support;
- which theory has the most common sense appeal;
- which theory has the best fit with the jury instructions.

B. Theme of the Case

The opening statement should always contain a theme which will resonate a major point in your case. Themes are the anchors that summarize your case. They are the memorable words or phrases that encapsulate the essence of your case, your position on liability and damages, and project the images you want the jury to retain about the case. Information during a trial often can be complicated or overwhelming. Themes help jurors understand the parties' positions and help jurors focus on the disputes of the case. Jurors instinctively create themes to distill and summarize what each case is about. Rather than creating their own themes, many jurors find it easier to adopt a theme provided by a trial lawyer and use that theme in processing the contested facts and resolving the dispute issues.

A theme is a rhetorical device that incorporates the strongest argument on the pivotal elements of the trial theory. Your theme gives persuasive force to the theory and can provide the moral framework of the case. Themes can be a single

word or a short phrase. A simple case may require only one theme, while more complex cases may necessitate three or four themes.

Good themes are based on the universal truths about people and events we learn during our lives. Good sources of themes are the great works of literature and popular sayings that our part of our everyday speech.

Examples of common themes:

- Single words can powerfully explain human motives: duty, honor, love, hate, greed, revenge, and responsibility.
- Phrases can create powerful images of morality and human behavior: “a few seconds of carelessness,” “a ticking time bomb,” “taking responsibility for your actions,” “treat others as you would yourself,” “respect your fellow man,” “rush to justice,” and “profits over safety.”
- **Steps to a Winning Theme**

A successful theme focuses on the element or elements that are most in controversy. The following steps can be followed to develop a winning theme:

- identify key elements of the theory;
- look for community impact issues;
- develop a short, memorable expression that focuses on the impact area of the key element.

Remember that a good theme presents a memorable argument that answers the question, “Why should the jury resolve the pivotal issue in favor of your client?”

Emphasize your themes and theories from the beginning and reiterate them throughout the trial in your direct and cross examinations and in closing argument. Remember primacy - the jurors, in a matter of minutes, will form impressions about you, your client, and your case. Thus, the first minute or two of the opening statement should unfold your theory of the case, state your themes, and convey them in a positive, interesting, human way.

III. Storytelling

People instinctively use storytelling to communicate with others, as the story framework enables us to better organize, understand, and remember information. Good stories organize, humanize and dramatize. They have plot, characters, and emotion. They are told in a way that puts the members of the audience into the picture, engaging their hearts and minds, so that the audience cares about the people and what happens to them. While many lawyers are born with an innate gift of good storytelling, others must work to become proficient. The following list contains the key ingredients of good storytelling.

The Ingredients of Good Storytelling

- **Begin Strongly**

Start with an attention grabbing statement which states the essence of your position. Do not minimize yourself with such phrases as what I am about to say is not evidence.” The judge has already told the jury that.

- **Focus on the people, not the problem.**

Most jurors see the world through emotional eyes. They are interested in people and what makes them do the things they do. Play on that interest by focusing on and personalizing your party and key witnesses. Jurors want to feel good about their decisions, and they cannot unless they learn enough about the key people to get a feel for them and reach a verdict that is consistent with their feelings. Personalizing your party is vital because jurors want to help people they like. That's simply human nature.

- **Create vivid pictures.**

Successful openings emphasize the events giving rise to the case, rather than simply focusing on the legal issues involved. The most effective storytellers use sensory language to create vivid images that give life to the story and dimension to the characters. When appropriate, your storytelling should be emotional and dramatic, allowing jurors to be drawn into your story and creating empathy for your client. Furthermore, visual aids should be used when possible to further strengthen the visual interest and impact of your story.

- **Organization is key to comprehension.**

Storytelling must be organized in a simple logical way. Often the best way to organize is chronologically, since jurors are used to hearing

stories that move from beginning to end. Another possible organization method is to describe the last event first, and then loop back to describe the events leading up to the last event.

- **Alert the jurors to coming attractions.**

Giving the jurors a preview of important testimony heightens anticipation and keeps their attention during the trial. This is particularly important for the defendant, since their evidence is presented last.

- **Keep your words simple yet memorable.**

Use the language of real people, not lawyers. A newspaper is written on a 6th grade reading level. Use that as your guide. However, choose words which are descriptive to effectively paint the mental picture that you want the jury to see.

- **Request a verdict.**

Jurors want to know what you want them to do. Make sure that you let them know what a favorable verdict is from your point of view.

- **Be Efficient**

A good story is also told efficiently, always moving forward so that it never stalls or becomes boring. Remember that jurors have limited attention spans and limited capacities to retain information. Most

opening statements should be 10 to 30 minutes long. Using any more time is counterproductive as jurors will be overwhelmed, confused by details and will respond by refusing to listen.

IV. Delivery

Perhaps the most difficult part of telling a story is not conceptualization or composition, but delivery. Everyone can think of an occasion when a poorly delivered joke resulted in dead silence. Delivery is also crucial for a lawyer. Jurors are quick to pick up on the fact that the lawyer seems less than confident about the case, and such a conclusion will only serve to destroy your case. Thus, your opening statement must be delivered in a way that lets the jurors know that you are eager to get the trial under way, enthusiastic about your case, and confident that they jurors will do the right thing at the end. While lawyers deliver their opening statements in a variety of personal styles, the good ones all project the same idea - we expect to win this case. Effective delivery takes place in three steps.

1. **Unite your audience.**

Give an introduction that draws them in. Capture their attention early with words that signal a transition into a story or actions that do the same such as changing your position in front of the jury box, retrieving a visual aid, or slightly modifying your tone of voice or stance. Look for signals from the jury that they are engaged, such as eye contact, facial expressions, and posture.

2. **Let them experience what you want to share.**

This requires you to pay attention not only to what you are saying but how they are responding. Convey your story in vivid terms. Appeal to their senses. Tell them how things look, smell, taste, feel and sound. You want to engage them at the point where they start to block out their physical surrounds in exchange.

3. **Once you have conveyed the narrative, bring them to a conclusion likely to evoke the response you seek.**

In some cases this will mean they connect the analogy you have drawn to the facts under consideration. In others, there will be a measure of emotion. Whatever your goal, be sure they get it before you move along.

Presentation

Remember that you have more than just words to help you tell the story. You can convey a great deal just by changing the tone of your voice, gesturing, changing your posture, altering your facial expressions and moving your eyes.

- **Tone of voice**

Remember that your tone trumps the words themselves. Avoid any tones suggesting reticence, insincerity or condescension. Also remember that a well-placed pause can convey as much as words.

- **Gesturing**

Most people are taught to avoid gesturing because it is distracting. However, the appropriate gestures can enhance your story by indicating movement, applying emphasis or imitating an action.

- **Posture**

Posture complements all others. Do not undermine your gestures and tone with inappropriate body orientation. Your body will give away your true feelings.

- **Facial expression**

Remember that your facial expressions can reveal feelings contrary to the words that you are using.

One of the most important aspects of delivery is to be yourself. Inexperienced lawyers often attempt to imitate another attorney's style. However, imitation often leads to a delivery that seems forced, contrived and less believable to the jury. Develop your own style around the strongest points in your personality. Opening Statement is your best opportunity to give the jury a chance to like you and to believe in you and what you say. This is important because the jury will transfer that trust into credibility factors when listening to testimony later in trial.

V. 10 Suggested Do's and Don'ts of Opening Statements

1. Do Be Prepared.

The opening statement can and should be prepared well in advance and it should be rehearsed.

2. Do Use Visual Aids.

If there are one or more documents that are critical to your case, enlarge them so you can show them to the jury and talk about them during opening statement. Visual aids will keep the jury interested and help the flow of your opening statement. Remember that the visual aids must fairly summarize the evidence, they cannot be misleading or argumentative. Also remember to obtain advance permission to use the aids.

3. Do talk to the jurors as an equal, don't talk up or down to them.

Use simple words. Remember your body language and tone convey more than what you actually say.

4. Do Stay Focused.

Develop your theory of the case, your theme, and your Story, and emphasize them throughout the trial.

5. Do Be Yourself.

Find your own style. No matter how brilliant you have seen another's opening statement, don't attempt to copy their style. Imitating others only increases your chances of appearing forced or contrived and less genuine.

6. **Don't Read to the Jury or Make a Speech.**

Nobody likes to be read to, and the jury will not appreciate it either. Maintain good eye contact and talk to the jury in a conversational tone. Ideally, an opening statement should be delivered without the use of notes or an outline. If you find this extremely hard to do, develop a brief outline and keep it at the podium or counsel table to refer to during brief pauses in the opening statement. That way, when you are talking you are able to maintain eye contact with the jury.

7. **Don't Overreach.**

Credibility is crucial. If you promise something you cannot deliver, the jury will remember, and you will pay for it during closing arguments when the opposing counsel reminds the jury that you have not proven what you promised.

8. **Don't Be Long-winded**

You want to give the jury an overview of your case and your trial themes, but you do not want to get bogged down in detail. Every case is different, but if you get much beyond 20 or 30 minutes, you run the risk of losing the jury.

9. **Don't get wrapped up in detail.**

The evidence will do that. Give the jury the outline of your story, logically organized, easy to remember, easy to relate to and easy to agree with.

10. **Don't attack your opponent**

Unless your case centers around a credibility issue, it is generally not a good idea to attack your opponent, his or her counsel, or his or her witnesses in your opening statement. Stick with the validity and believability of your client's story.