

Effective Opening Statements

I. Introduction

The opening statement is one of the most important components of any trial. It is your first opportunity to present the case to the jury, and to shape the jury's perspective of the entire trial. The opening statement also is your first opportunity to present yourself to the jury, and to establish the kind of credibility that will persuade jurors to trust the testimony, documents, and other evidence that you eventually will submit for their consideration. A superb opening can set you on a path toward winning the case, but a disastrous opening may be difficult to overcome. Thus, the content and the presentation of your opening statement must be developed with care.

As a general rule, counsel may not argue during opening. Rather, the opening statement should serve as a preview of the anticipated testimony, exhibits, and other evidence. Think of the opening statement as a forecast, designed to provide a general understanding and provoke further interest, like the kind of preview you might see on the inside jacket of a novel. The jacket text that introduces a novel typically does not confuse the prospective reader with an overly detailed chronology of events; it does not bore the reader with a recitation of the characters' names in the order they will appear in the book; and it does not command the reader to feel a certain way about the story contained in its pages. Instead, the jacket text captures the essence of the book in a way that gives the reader a general sense of the book's theme, entices the reader to proceed further, and leaves the reader to make his own judgment regarding the final meaning of the story. That is the way jurors should be left at the end of the opening statement – with an understanding of the case's theme, an eagerness to learn more, and an appreciation for the ultimate judgment they will be asked to make.

II. Elements of the Opening Statement

Theme of the Case

In the opening statement, a lawyer should provide the jury with a theme that will serve as a framework for every piece of evidence the jury hears during the case. The theme should communicate how the evidence will fit together, and why your client's position in the case is the right one. For instance, a lawyer defending a discrimination case may have a theme of "unheeded warnings" to communicate that the plaintiff had a chance to improve their performance before termination, but failed to take advantage of the opportunity. Plaintiff's counsel in the same case may have a theme of "repeated disciplinary actions, all motivated by race." Obviously, expressing a theme is difficult to do without bordering on argument – which is improper in the opening statement – but courts generally allow a lawyer to state a theme at the beginning and end of the opening statement, as long as the rest of the opening is not argumentative.

A good way to develop a theme is to try to describe your case in one summary sentence, without legalese, as you might do if you were explaining your case to a non-lawyer family

member. Get to the heart of the issue – think about the parties’ motivations, and the reasons events unfolded the way they did. Answer the question: What really happened here?

Perhaps the case centers on someone’s personality flaw. In the employment context, a plaintiff’s lawyer may focus on a sexual harasser who “can’t take no for an answer”; a defense lawyer’s theme may focus on an employee’s “refusal to accept his own failure”. Perhaps the theme of the case is a situation, such as “a company where minorities are routinely kept in lower-level jobs” or “a supervisor forced to make difficult choices when the company hit hard times.” Whatever the theme of your case, make sure it is a concept that resonates with people from all walks of life, and one that is borne out by the evidence you will be presenting during the trial.

Often, the easiest way to present a coherent theme is to state it in a straightforward manner as your introductory sentence: “Ladies and gentlemen, this case is about unfair competition by the defendant.” In other situations, the theme may come out more subtly, as you tell a story that slowly unfolds. Regardless of how the theme is presented, make sure it is absolutely clear by the end. Before all of the witnesses and documents are presented to the jury, make sure the jury knows exactly what they should be listening for – from your point of view. (While you can’t argue your position, you *can* arrange the facts in such a way that only one conclusion is inevitable.)

Don’t Waste Time Getting to the Theme

Many lawyers waste the precious first few minutes of their first impression by shuffling through papers, explaining the purpose of the opening statement, thanking the jury for their time and service to the community, and/or going through lengthy introductions of co-counsel and client representatives. The first impression should be more compelling. Be ready to begin your opening as soon as the moment arrives. Stand up quickly and start speaking with confidence, demonstrating immediately that you are prepared and sure of what you’re saying. Tell the jury something interesting in your first few sentences, and then return to the more mundane tasks of introductions and thanks. For example:

The defendant had a contract with Smith Corporation. He promised that, in exchange for three years of employment at a substantial salary, he would not take Smith’s customers and employees when his employment ended. The defendant has broken this promise. When his employment with Smith Corporation ended last December, the defendant stole five clients and three employees, and caused Smith Corporation to lose \$10 million in business. That is why we are here today. Ladies and gentlemen, my name is John Jackson. Together with my co-counsel Sue Jones, I represent Smith Corporation. Sitting with us at the plaintiff’s table is Robert Smith, the President of Smith Corporation. In this trial, we ask you to hold the defendant responsible for his wrongful acts.

Set the Scene

After introducing your theme, you must set the scene of the case, building upon the framework you have presented. Narrate the scene and introduce people and documents as they naturally fit into the theme of the case – do not present a witness-by-witness catalogue of testimony. For instance, tell the jury how they will learn about the plaintiff's poor job performance. Tell them they will hear from the plaintiff's supervisor, who will explain that the plaintiff was warned on numerous occasions that her attention to detail needed improvement. Explain that the documentary evidence will support the supervisor's testimony, as the jury will see four years of increasingly bad performance reviews. Tell them they will hear from a human resources manager who will put those reviews in context, and compare the reviews to others received by employees company-wide. Present the people and evidence in the context of a story, and the jury will look forward to hearing the story unfold as the trial progresses. This way, the facts will not seem confusing and unrelated as they are presented during the direct and cross examinations. Instead, the jury will remember your narration and recognize each character of your story as he or she appears in the trial.

No Argument In The Opening Statement

Jurors are not supposed to form an opinion on the case until they have heard all of the evidence. Accordingly, as stated above, arguments are improper during opening statements, because arguments may not precede the introduction of evidence. (Note the meaningful difference between the terms "opening statement" and "closing argument.")

How can a lawyer introduce the case without arguing? Generally, if the opening statement explains what you expect the evidence to prove, you are properly opening the case. Unfortunately, there is a subtle difference between what is a proper opening statement and what is an improper argumentative opening statement. Lawyers should avoid expressing opinions; should not make direct statements as to why a particular piece of evidence is not believable; and should not vigorously attack the opponent's case. Nonetheless, a lawyer's position on the case will come through in an effective opening statement, from the order in which facts and evidence are presented; in the choice of which facts are emphasized and which are downplayed; and in the descriptive terms that are used (were they "lewd jokes" or just "sexual banter in the office"?). You can be an advocate without arguing.

The following test is useful to help gauge whether you are recounting facts and evidence or arguing them. Ask yourself this question: Are you describing to the jury what a witness or document states, or are you drawing a conclusion from the testimony or the document? Only the description is permissible in your opening statement; the conclusion must be saved for your closing argument.

Be Persuasive Without Arguing

Despite the rule against arguments in opening statements, lawyers still can be persuasive. Too many lawyers weaken their persuasiveness by trying to make absolutely clear that they are

not arguing. They repeatedly begin sentences with: “The evidence will show” This quickly becomes boring for the jury to hear, and it is unnecessary. Instead, tell the jury in the beginning that you are going to describe what the evidence will establish, and then never say that again unless there is an objection.

Let the facts themselves argue your case. Assemble the facts, and present them in a manner that leaves only one conclusion – the one you are advancing. If you want to convey that an employee was terminated immediately after complaining of harassment, present the events that way in your opening – describe the complaint, and follow immediately with the termination. On the other hand, if you want to separate the complaint from the termination, describe the complaint, then spend a while describing any intervening events, and *then* address the termination. You will have communicated the lack of relationship between the complaint and the termination not only by the facts, but by the timing and order of your presentation.

If you are successful in positioning your facts and evidence, there is no need to argue what the jury must find, what they must conclude, or the verdict they must deliver. The facts will speak for themselves.

Personalize Your Client

Use the opening as an opportunity to persuade the jury to like your client. Explain your client’s motivations, and give the jury reasons to feel camaraderie with your client. If you represent an individual plaintiff, convince the jury of your client’s integrity, and persuade them that your client is not just out to make an easy buck; rather, your client suffered real harm. Obviously, a lawyer representing an individual against a corporation may have an easier job personalizing the client, but a management-side lawyer can personalize their client as well, and the need to do so cannot be underestimated. For example, rather than focusing on the corporation itself, a management-side lawyer should tell the jury about the people who comprise the corporation – the relevant supervisors, the human resources representative, and/or the company’s owner. Familiarize the jury with these individuals’ names, and their roles in the drama, so that the jury will be considering the actions of people versus people in the case, rather than a single, sympathetic plaintiff against a huge, faceless corporation.

Dealing with “Bad Facts”

Should your opening statement address harmful information that is likely to come out at trial? In other words, does an effective lawyer “front” problems in the case? Lawyers inevitably are dealt “good” facts and “bad” facts, “good” evidence and “bad” evidence, “favorable” law and “unfavorable” law. Part of your job is to determine how to face these obstacles.

One option is to address the harmful information before it can be raised by opposing counsel, in order to diffuse the situation. Presenting all issues, good and bad, may ensure your credibility with the jury, and convey that you believe in your case despite any evidentiary hurdles.

A contrary approach is to wait and see whether and how the information comes out before giving it any attention. Jurors commonly do not expect lawyers to say anything negative about their own witnesses, their evidence, or their case. Thus, by focusing on harmful information, you may call greater attention to the damaging information than necessary. Also, remember that once the opening statements have been delivered, the trial itself provides a chance to respond to any charges that the other side makes.

Whether to introduce damaging information obviously is a matter of judgment, and the decision will differ from case to case. A middle ground might include introducing harmful information, but spending only a passing moment discussing it. Or, introduce all positive information first, and only after such information has been laid out for the jury, address the negative information and explain why it is not persuasive, thereby emphasizing its insignificance to the case.

Importantly, defense counsel has the advantage of going second. If the jury did not learn the harmful information during the plaintiff's opening, then the need to deliver the information during the defense's opening is decreased. While the plaintiff may decide to introduce the negative information into evidence later in the trial, consider the possibility that the plaintiff may decide not to introduce the evidence at all; the court may decide not to admit it; or the evidence may come in weakly, without the power you expected. Thus, it may be wiser for defense counsel to avoid discussing any "bad facts" in the opening statement that plaintiff's counsel has not already raised.

Visual Aids

It has been said that a picture is worth 1,000 words. Thus, keep in mind that effective opening statements need not be limited to words. The use of exhibits and visual aids can enhance the value and effectiveness of counsel's opening statement. (Just make sure that you have followed your court's rules on the subject, and have a "plan B" if the court decides not to allow your visual aids.)

Remember, the purpose of the opening statement is to explain what the evidence will show, and a good explanation may include some of the evidence itself. Lawyers generally are allowed to read from, or display, documents and other exhibits that they expect to be admitted into evidence. Less is more in this situation, however – counsel should include only two or three of the most important exhibits, and not confuse or overwhelm the jury with too many details. Use a pointer so the jury can follow as you indicate what the exhibit reflects. To the extent that the evidence includes important photographs, maps, and/or charts, use them. If your case hinges on a performance review, a letter, or a contract provision, enlarge it and show it to the jurors.

Visual aids, which may summarize or analyze the evidence, such as charts, graphs, and chronologies, also are tools that may enhance the opening statement, as they can help jurors understand the eventual trial evidence. As long as the visual aids are not misleading or argumentative, such as "Five reasons why the plaintiff should lose," they should be acceptable for use during the opening statement in most courts. Counsel should remember, however, to

show opposing counsel any visual aids in advance, and to obtain advance permission for their use from the court.

Finally, exhibits that are not visual also may be used during the opening statement. In the right types of cases, it might be advisable to use tape recordings, for example, if they will later be offered into evidence. The key is to get the jurors interested in what you have to say. Visual and other sensory aids will help keep jurors attentive, interested, and informed.

Plaintiff's Opening vs. Defendant's Opening

Delivering an opening statement on behalf of a plaintiff presents different challenges than delivering an opening statement on behalf of a defendant. Plaintiff's counsel must determine whether to anticipate and respond to expected defenses. Defendant's counsel must decide whether to react to the plaintiff's opening.

In the employment context, plaintiff's counsel faces particular difficulty when it is expected that the defendant will present an affirmative defense. Affirmative defenses raise issues that go beyond the plaintiff's own case. Accordingly, if you are plaintiff's counsel, you must decide whether to ignore the affirmative defense and lose the opportunity to reply to it until later in the case, or respond to the defense in advance. If you choose to address the affirmative defense in your opening, be sure to avoid getting the jurors fixated on the negative aspects of your case. Reject the affirmative defense quickly and for a solid reason. Be firm, unapologetic and straightforward. If you seem overly concerned about the defense, it will suggest to the jurors that you have a weak case.

Another tough question for plaintiff's counsel is whether to address damages. Generally, asking for specific damages in the opening statement is premature, and may turn off the jury. Save it for closing, when the jury will be entirely convinced of the defendant's misconduct and ready to consider the financial consequences.

Defendant's counsel faces different issues when delivering their opening statement, caused by the advantage and disadvantage of going second. If you are defense counsel, by the time you begin your opening statement, both you and the jury will have listened to the opening by plaintiff's counsel. The jury will be waiting for your take on the dispute to which they have just been introduced. After all, the plaintiff's opening statement is essentially an accusation, and the jury will be wondering if the plaintiff's allegations about your client are true. As defense counsel, you must respond with a clear denial, as anything short of a denial will be seen as an admission of fault. It is also important that you respond, to some extent, to the plaintiff's version of the evidence. Simply telling your independent version of the story is not sufficient, as that will not help explain why the facts that support your version of the story are superior. Instead, as you set forth the evidence in your opening statement, note on occasion how the evidence contradicts the plaintiff's theory of the case (without crossing the line into argument). For instance, "Plaintiff's counsel told you that Ms. Clark did not have an adequate opportunity to improve her job performance. But in this case, you will see no less than five performance

reviews, over a period of five years, in which Ms. Clark was specifically advised to pay closer attention to deadlines.”

Additionally, it is perfectly permissible to point out evidentiary gaps in the plaintiff’s opening statement, and if appropriate to your case, you should do it. For example, “Plaintiff’s counsel accused my client of sending her offensive e-mails every day for six months. Where are those e-mails? In this trial, plaintiff will not have even one e-mail to show you.”

Finally, defense counsel must respond to comments concerning the credibility of defense witnesses. Silence may be seen as a tacit admission. Use the opening to protect and defend your witnesses, by introducing them to the jury with facts that demonstrate their integrity, trustworthiness, and/or lack of bias.

Omissions by the Other Side

Listen for what is missing from opposing counsel’s opening. Is there something opposing counsel is afraid of? Is there a “bad fact” that opposing counsel intentionally avoided discussing? Often, the silence may provide more clues about opposing counsel’s plan for the case than what is actually discussed. Use the omissions to help you strategize as the case proceeds.

Discussing the Law

The judge will explain the legal questions for the jury’s consideration when the jury instructions are given, usually at the close of the evidence or after counsel’s closing arguments. Thus, the opening statement generally is not the time to tell the jury what legal questions will be the subject of their deliberations. Sometimes, however, a lawyer must reference legal questions in the opening statement to give the jury some context for the subject of the trial. For instance, a lawyer may tell the jury they will be asked to decide what kind of conduct constitutes sexual harassment, or whether a company’s response to a harassment complaint was sufficient. As long as the legal questions are broadly framed, the judge likely will allow the lawyer some latitude.

Exaggeration

The opening statement should be straightforward and direct. Avoid exaggerating or misstating the facts, and don’t overdo the emotion. If a lawyer relies on exaggeration to appeal to the jury, he or she will certainly hear about “broken promises” in opposing counsel’s closing arguments. Moreover, counsel should remember to be sensitive to any issues which the jury may find uncomfortable, and should avoid attacking witnesses too harshly as they are described. Jurors may react with sympathy for the witnesses, and might hold it against the lawyer and, consequently, the lawyer’s client.

Nonetheless, a lawyer should not be afraid to use exaggeration to his or her advantage. Sometimes, for example, reading from the other party’s own pleadings is helpful if the pleadings

have exaggerated the facts, and the opposing party will never be able to prove the statements they have made.

Movement

Your opening statement may be more forceful and effective if you move about the courtroom during your delivery (assuming the court's rules do not restrict you to a podium or table). Movement can be used to transition from one topic to another, or to emphasize a particular point. For example, to highlight a change of subjects during the opening, take a step or two to the side, and pause. This will signal to the jury that one subject has ended and another is about to begin. The motion also will refocus the jurors' attention on you if their mind has temporarily wandered.

Deliberate movements also can attract the jury's attention and emphasize an important point. Should you want to stress a critical fact, take a few steps towards the jurors. The faster and more purposeful your movements, the more emphasis is placed on the point you are making. Use a transition sentence while moving toward the jury, then come to a stop, and deliver the important point while standing still. The contrast will emphasize the point.

Too much movement can be ineffective, however. Don't move so much that the jury notices your movement more than your words. Do not run, and do not hover over the jurors. The invasion of their space may be seen as threatening, claustrophobic, and overbearing. Also, don't pace. Pacing distracts the jury and deprives the lawyer of the ability to use movement for emphasis.

Do Not Read Your Opening

Do not read the opening statement. You must become comfortable talking directly to the jurors, as there is little more uninspiring and dull than a lawyer who reads the opening statement. While reading the opening may help you avoid forgetting any of your points, and may ensure smoothly flowing sentences, an opening that is read is essentially a waste of time, as the content undoubtedly will be overshadowed by the poor delivery. Jurors want to see a lawyer's concern and familiarity with the case. Relying on a script conveys the opposite – a lack of true belief in the case, and a lack of familiarity with the events at issue. Notes in outline form are a different story, however – notes may be referred to in between pauses without dampening the effect. Moreover, it may be helpful to write out the opening statement in full during the preparation stage, and practice delivering it from the script, getting progressively less and less reliant upon the written words. When the real moment comes, however, a lawyer should put the script away. Don't even bring it to the courtroom, as you may be too tempted to use it.

Look at the jurors while making the opening statement, and show them you care about your case, and what they think. Connect with all of the jurors – don't just focus on a select few, no matter what reactions you are getting. Jurors will appreciate the attention and interaction, and will be more receptive to your presentation. Do not forget the importance of a friendly demeanor. Do your best to give the jurors a favorable impression of you as a person, in addition

to you as a lawyer. Don't be afraid to laugh at your own mistakes, if you misspeak or fumble with your words for a moment. Jurors generally appreciate lawyers who are humble, and do not take every single moment seriously. Moreover, jurors, like most people, do not like hostility and anger. Lawyers who demean, insult, or bait the other side are inviting the jury to dislike them, and to extend sympathy to the other side. Acting courteously toward opposing counsel, witnesses, the judge, and courtroom personnel is never a mistake.

Bench Trials

Lawyers often agree to waive the opening statement in bench trials, but waiving the opening generally is not a wise move. Just like jurors, a judge needs an overview of the case before the evidence is presented, so that the evidence will have some context. Thus, unless the case has been assigned to the same judge for a long time, and you are certain the judge (and the judge's clerk) knows your case extremely well, do not waive the opening – just make it shorter and less dramatic. Also, feel free to address more law during your opening in a bench trial. Clarify for the judge what legal questions will govern the case, and what standards the judge will need to apply.

III. Concluding Your Opening Statement

A simple, smart way to conclude your opening is to tell the jury exactly what you would like from them at the end of the case: “After you've heard all the evidence, we will ask you to return your verdict for the plaintiff, Sally James.” Such an ending may not be dramatic, but it gets your ultimate point across effectively. Or, consider ending with an expression of thanks for the jurors' time and attention. If you can do it sincerely, a statement of gratitude may be the best way to curry jurors' favor before you embark upon the next stage of the trial.

Above all else, conclude confidently, and with an unambiguous message. Leave the jury with a clear understanding of your client's position in the case, a basis for believing your side, and an appreciation for their role in the rest of the trial.