

## Effective Opening Statements

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### **I Introduction:**

It is my opinion that the opening statement is many times the most important stage of the trial. An effective opening statement can and will persuade the jury. In fact, every effort should be made to persuade the jury during that portion of the trial. There is nothing wrong with this, which can occur within the bounds of ethics and the particular fact situation involved.

Never assume that a juror will keep an open mind about your case during the entire course of the trial. The importance of the first impression cannot be overstated. Your window of opportunity to persuade jurors is shorter than you think. The first thoughts someone has about a subject usually constitute what they believe.<sup>1</sup> Studies have shown that 80 percent of jurors make up their mind during opening statement. Said another way, one jury consultant once informed me that 85-90% of jurors do not

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<sup>1</sup> It is a whole other topic of discussion whether someone has preconceived notions about a subject before hearing your side of the case. It is the opinion of this author, after personal experience and hearing discussion on the topic, that many jurors' preconceived notions cannot be overcome by facts and argument in the short period of a trial. It is therefore, many times, necessary to adopt those notions and incorporate them in to your case where possible. This discussion of opening statements assumes a blank slate on the opinions of your jurors.

change their decision between the end of opening statements and the conclusion of the trial.

That is not to say that jurors realize that their minds are made up, but rather that they have made crucial decisions about credibility and positions that determine how they interpret the forthcoming evidence and ultimately how they make verdict decisions. Therefore, the time provided for opening statement should not be wasted. Start strong. Your purpose should be to persuade and gain credibility from the beginning.

## **II The Purpose of Opening Statements**

While there are many goals that should be accomplished during opening statement, the following are the most important:

### **A. Persuade**

It is always my goal to persuade the jury from my first words. The human thought process goes through two distinct phases. The first phase is the *framing* process, which occurs extremely early in the trial. The second phase, which is less important to this opening statement discussion, is the *scrutinizing* phase. The "scrutinizing" phase occurs during the presentation of evidence. In this phase the juror is actively comparing what they learned in the framing phase to what is being shown during the trial.

The purpose of the first "framing" phase is for the juror to determine "what is this case about?" and, during this phase, the juror is open to persuasive techniques. It is my opinion that it is a mistake to waste this time with the

standard "I expect the evidence to show" opening statement. The judge has told the jurors that what you say is not evidence. I wouldn't reinforce the court's comments with your own admission that what you're saying shouldn't be considered. Only my opinion.

It is during this framing phase that the juror rapidly begins building a framework with which to fit the case. The plaintiff's attorney should be creative during this stage. I have found that incorporating visuals into the opening statement is highly persuasive. As opposed, to saying "I expect the evidence to show...."Instead, show'em. Why not? This is allowed in Alabama and many jurisdictions.

I often use trial presentation software for the visuals in what I call the "show'em" portion of the opening statement. I think it is important to be time considerate in opening statement and, therefore, visuals must be highly thought out in advance. I like to highlight my strong points with the actual evidence. This can be done with pictures, graphs, statistics, video, learned treatises (if allowed), or simple text.

I almost always try to argue the defendant admitted liability or that something they said can you leave the jury with only one conclusion concerning liability. I lead up to it with "Your job today is simple. One thing I promise you'll see is that the defendant admitted this whole thing was his fault." I then show them his testimony and follow up with a brief oral description of the expected

law that will be charged by the judge showing why that particular statement shows acknowledges the negligent or wrongful conduct.

**B. Establish a theme.**

What is a case theme? A theme is your movie trailer. If you could put together a case trailer in 10 or fewer words that were replayed throughout your trial, it would be your theme. The theme should be established during the opening statement and built upon during the trial.

Much discussion and thought have been put into the use of themes. A great paper on the subject was written by John F. Romano, "The Creation, Articulation, Presentation and Demonstration of a Case Theme in Personal Injury and Wrongful Death Cases." Mr. Romano takes the time in his paper to fully address the topic. For the purpose of this paper, I say this: 1) you need one to be established in the opening statement and 2) it should directly relate to the facts of your case. 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.

**C. Be Direct**

Simply put, tell the jury in clear and concise terminology what the case is about and what you are asking them to do. For example, they need to be told

that you are asking them to find that this product is defective and that it caused your client's harm.

#### **D. Take Away the Defendant's Bombshells**

You should ask yourself how well you know your case if you don't already know what the defendant is banking on in their case. If so, soften the thunder. The plaintiff's attorney should openly discuss the defenses that have been put forth by the defendant. He or she should also have an answer for any problem areas or weaknesses. This will minimize the effect of opposing counsel's opening statement when he talks about your case weaknesses. The jury already has an answer. Also, remember the jurors are still in the framing phase. You get first opportunity to frame the weaknesses. Don't let the defense do it for you. Honesty concerning your weaknesses also allows you to establish credibility, which is discussed next.

#### **E. Establish Credibility**

I can't stress enough how important this goal is to winning your case. Don't quote me on this, but I was once told that the most important factors in any case come in this order: 1) Do the jurors like the client, 2) do the jurors like the lawyers, and 3) the facts. Again, I'm not sure if it's true or not, but in my experience it matters. The jurors will not like you if they can't believe what you say. You should also make efforts at being likeable in other areas. Being a Jerk usually doesn't work out so strong. Why? People don't appreciate that behavior.

Jurors are people. Equally important is telling the truth. People don't like liars.

Jurors are people. Credibility is established in many ways:

1. Demeanor
2. Never overstate or exaggerate
3. Be honest with your weaknesses
4. Be honest at all cost, don't say anything that can't be supported.

#### **F. Foundation for Closing**

Your opening statement should serve as an outline or foundation for closing argument. I like to point back to my promises (discussed below)

#### **G. The Promise<sup>2</sup>**

This is extremely important in my opening statements. It is central to my attempts to build credibility with the jury. What do I do? I make promises. Lots of them. I promise everything:

1. How my client will be depicted.
2. How the defendant will be depicted.
3. What the evidence will show (lots here)
4. What the law will say.
5. What will happen during the course of the trial?

I like making promises with the jury. We southerners take our promises pretty serious. I'm sure everybody does, but it means something in Alabama. I

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<sup>2</sup> Much of the way I organize opening statements came from advice heard in a speech given by David Marsh on October 31, 2003 during a presentation on the subject. This "promise" section was unabashedly plagiarized from that speech.

better be able to show these people what I promise or I'm out. In fact, I ask the jury to do just that. Remember what phase these jurors are in with regard to the thought process. They are framing the case. I'm making promises and they know I can't break them or I lose. I feel like jurors are thinking "he wouldn't be promising this if it weren't true."

I've always felt comfortable after making sufficient promises to carry my burden of proof that all I had to do was deliver, but am always wary of not being able to fulfill my promises for some yet unknown reason. Remember, that in the second scrutiny phase the juror is determining whether or not the information they got early in the framing phase really fits the frame work they established. Rarely will a compelling piece of evidence or testimony override the framework and persuade a juror to change their mind. In determining whether a piece of evidence is credible or not, jurors consider the source as the primary indicator of reliability, and the credibility of the source (litigant and attorney) is the main ingredient of the framework.

### **III Discussing Damages During Opening Statement**

Some believe that it is a mistake to discuss damages during opening statement. Many "text Book" discussions on opening statement put damages at the end of the central theme of the case; however, significant damages should be discussed in great detail.

### **IV. Conclusion**

1. Keep all promises

2. Don't hold back. Some fine trial attorneys feel that certain strong evidence should be "held back" during the opening statement and allowed to unfold during trial. This is usually a mistake. Remember, the jury will be most receptive to persuasion during the framework phase early in the trial. Don't waste time.

Persuasion should be focused heavily on opening statements. Once the window to persuade your jurors is closed, it is nearly impossible to rehabilitate a juror. Rather than try to persuade during the evidence presentation, focus your energy during trial on supplying the jurors with the arguments they need to argue your case during deliberations.

3. Use demonstrative evidence during opening. Show `em why your client should win. Effective visual aids, models, and Power Point can do more in less time than I can ever say. It is the proof. I like using filmed doctor's depositions just for opening statements. I'll ask the doctor 3 or 4 times about causation or other important issues. I'll then tell the jury, "I promise to show you that this incident caused his injuries 3 different times." Then show `em.

4. Be organized. Rambling and skipping around from unrelated points is confusing. I'm not saying memorize your opening. I am saying that you need to know the gist of what you plan to say. Ask your wife or anybody if they understood. Don't ask if you did a good job. Your wife thinks you did a good job or she will tell you that so she can move on to something much more

interesting. Instead, ask questions about the opening. These are some questions:

- a. What was the case about?
- b. Did you lose me at any point?
- c. What was my strongest point? (ask yourself does it match with what you think is the strongest point?)
- d. Tell me one thing I can do better or what is the weak point.

We are not all born great off-the-cuff public speakers who can organize a complex case on the spot. I don't recommend memorizing what you plan to say, but I do recommend, in order to avoid notes, memorizing your outline. I basically have the same general outline for every case. Below is what I use:

- A. Nutshell (30 seconds or less about the case said in a way that it hits the jurors in the nose. They need to know what this case is about even if you stopped at that point.)
- B. Introduce myself and client telling a little bit about each.
- C. My promise. General promises about what I expect the evidence will show. Start off with "this is called opening statement. It is my opportunity to promise each of you what the evidence will show. It is my opportunity to make covenant with you about this case. If I don't do this, then we should lose." In a personal injury case you should promise liability, causation and damages. For instance, "I promise jury that you will uphold your promises, but point is to get them to make a promise. Ask the juror to promise they will uphold justice and stop injustice. Ask them to show you that when he hit her he did cause her to break her arm. I'll show you that every doctor who has testified in this case agrees. I promise to show you that that impact severely changed her life."
- D. Your promise. Remind that to promise that if you uphold your promises that they will stand up for justice. They know you mean to give your client a verdict.

- E. Tell the story. You should be creative and tell the story. You should incorporate visual evidence, but visual evidence and Power Points are a weak excuse for oral advocacy. I believe to effectively tell the story; there should NOT be a PowerPoint for every issue you want to discuss. This leads to a heavy reliance on the computer to tell the story for you. People want what they see on TV. Give them an oratorical show in addition to presenting visual evidence. Also, go back and forth between PowerPoint and other demonstrative evidence. I like boards. End it with reminding the jurors to hold you to the promises you just made.
  - F. Defense Story. Quickly tell what they said happen and what evidence you expect rebuts their story. Take away there bombshells. I like to say, "I don't know what that has to do with anything, because same thing would have happened even if what they said is true because....."
  - G. Damages. Go through evidence and play key portions of video depositions on that subject. Explain the purpose of damages whether compensatory or punitive (prevent future injury). Give the jury a range.
  - H. Burden. Explain burden. "If I uphold my promises by a preponderance of the evidence."
  - I. Wrap up. Go back to "My Promise" and "Your Promise." I promised to show you that.....You promised to be fair and impartial.....If we all do our job, and I know we will, then I'll ask you to return a verdict in a favor of..."
5. Make the jury feel special. They need to feel significant and that the case is significant. If confidential documents subject to a protective order are to be placed into evidence, you may wish to discuss the significance of the jury seeing these documents.
6. Make it simple.
7. Don't try to be funny.
8. Tell the judge what demonstrative evidence you plan to show. It is highly disruptive to your opening and may effect on integrity and credibility if you are reprimanded on a piece of evidence.

9. Never say the standard clichés or law school trial advocacy phrases. Examples are what I tell you “is not evidence” or “listen to all of the evidence before you make a decision.” Hopefully the defense will waste time with these useless phrases while you are persuading the jury.

10. Be yourself in the method of delivery. The jury will not necessarily believe the loudest. Understatement or silences are effective tools. Think about sincerity, eye contact, dramatic pauses, and voice inflection, etc., as opposed to shouting and fist banging.