

OPENING STATEMENTS

Introduction

The opening statement is a most important part of trying a lawsuit. Many lawyers do not treat the opening statement with the importance it deserves. Many opening statements are not well prepared which is inexcusable. Jurors generally have a very superficial knowledge of what your case involves even after experiencing voir dire examination. This is especially true where the trial judge conducts the examination. The jurors know nothing about the facts except what little they remember from voir dire. The lawyer for the Plaintiff has the responsibility of educating the jurors who know nothing about the facts and who also may have a distorted view of the law applicable to the case. In the post-tort reform atmosphere, the trial lawyer must deal with a great deal of adverse and oftentimes false information put out to the general public concerning lawsuits in general.

It is extremely important to let the jury know what your case is all about in simple, understandable terms. Most jurors really want to know what the case is about and why the Plaintiff is bringing this suit. They are disappointed and probably greatly surprised if they do not find out at the outset from the Plaintiff's lawyer that they are sitting on an important case and one that has its own unique and interesting set of facts.

The Rule of Primacy

I, like many others, believe that jurors tend to make up their minds to a large degree during the opening statements. This is probably why most defense lawyers ask the jury not to make up their minds until the defense has had their say. Of course, jurors can change their minds, especially if you have misled them or have done something that they will later consider to be unfair. If you say you will prove a key element of your case, you had best do so later. You may not win in the opening

statement, but you can certainly lose at that stage. First impressions generally last and do not change. If you do badly at the outset, you will have a hard row to hoe during the rest of the trial.

Develop a Style

Every trial lawyer should develop a style. No person can mimic another person successfully. It is generally a mistake when you try to be someone else. This does not mean that you cannot learn from good lawyers or that you cannot improve on their good traits and avoid their bad habits. It simply means that it is smart to be yourself and sort of dumb when you try to be somebody else. The days of a lawyer's reading a prepared script in opening statements are over. Jurors must be stimulated, educated, and entertained over the course of a fairly short trial in most instances. The lawyer must be resourceful, innovative, and must tell the jury why his or her client has brought them together and why the client is entitled to a verdict at their hands.

Develop Theme of Case

It makes good sense to develop the theme of your case early in your opening statement. This theme should have become a part of your case preparation long before you get to the courthouse. You are conveying the central message of your case to the jury and making them anticipate and then relate the trial evidence they will hear and see to your theme. If your case is based upon an insurance company's taking advantage of the elderly with fraudulent medicaid supplemental policies, let the jury know this. If it is based upon a total disregard for safety in design by an automobile manufacturer, the jury must know and appreciate this from the outset. If a front end lift device makes a farm tractor a highly dangerous machine, certainly your case must be built around that theme.

Word Pictures

A successful lawyer will use word pictures in the opening statement. It is easy to get a jury to understand what you are trying to tell them when you use this approach. If you have a crush type injury of a leg, you might consider telling the jury that Mr. Jones, the Plaintiff, suffered a massive crushing type injury to his lower leg which actually tore and ripped the skin, muscle, arteries, blood vessels, and nerves apart as his leg was pinned against a truck by the Defendant's earth-moving machine. His leg was not just broken in two places, it was crushed, causing great damage to the leg which is permanent in nature. Mr. Jones will be crippled for the rest of his life. Rather than simply telling the jury Mr. Jones is disabled, give the jury a picture in words of how his life has changed.

If you have a brain-damaged 20 year old lady, tell them how she sits in her room day after day with no hope of ever getting better. She is only able to get out of her room with the assistance of others. All of her daily functions, including eating, bathing, and using the bathroom require the same type assistance. She cannot work - neither can she do the things that we all take for granted - such as jogging, dancing, and taking out the garbage. She was put in this position because of the Defendant Acme Manufacturing Company's total disregard for safety when it designed her automobile which failed in a manner which was certainly foreseeable to this corporate Defendant.

Talk Like a Person

Explain your legal theories and factual matters in lay terms. Unless your jurors understand what you are talking about, they will not respond as well as they should in most cases. For example it may be better to use the word "fault" rather than "negligence" or "wantonness" in your opening

statement. The word "shows" usually means more to the average juror than does the word "depict". I hear lawyers saying to a jury this photograph depicts such and such when very few jurors would describe it that way. Most would say the photograph "shows" an intersection with a stop sign.

Burden of Proof

Some lawyers will accept the burden of proof during the opening statement. I find it helpful to let the jury know what my burden of proof is and that I do not back away from it. It is much better for you to state this rather than wait until the Defendant and the Court put the burden of proof on you in quite different terminology. I find that jurors respond to the Plaintiff accepting this challenge at the outset. Of course, you must work to get as many jurors to later help you meet this burden when the facts are discussed in the closed jury room.

Defenses and Weak Points

I believe that it helps to anticipate defenses and expose the weak points in your case during opening remarks. You may be able to explain away a serious defense relied upon by your opponent if you have a logical basis for doing so. It is generally better for you to acknowledge a weak point than to have your opponent hit you over the head with it after you have been totally silent on the point. One or more jurors may latch onto this weakness and never let go. On the other hand, they might have said - "this really isn't so bad or the Plaintiff's lawyer wouldn't have told us about it."

Damages

Damages must be woven into your opening statement. There is no hard fast rule as to when

you first mention damages. Sometimes I do so at the outset by describing the Plaintiff's plight and then telling how the Plaintiff came to be in this awful shape. Other times, I start with strong liability and shocking conduct by the Defendant and then add damages at the appropriate time.

If your case is weak on liability and strong on damages, you should emphasize damages first in your opening statement. In any event, you should let the jury know what your damages are in sufficient detail so they will be looking for the various elements during your evidence. They can then key in on testimony as it develops.

If you don't do a good job on damages, your verdict will reflect this in most every case.

Do Not Oversell

One rule that is broken more often than not is that you should not oversell the elements of your case. It is better to minimize in certain areas rather than trying to overkill at this point of the trial on every point. If you make a strong enough presentation, it is easy to fill in the gaps as you go. This is a difficult rule to follow. You must be able to discern how much is enough and how far to go. Do not tell the jury you are going to prove some fact when you know you can never do it. This can prove disastrous even on less than critical issues. It tends to destroy your credibility. Once your credibility is tarnished, your fight is much harder.

Establish a Relationship

It is critical to establish a good relationship with the jury at the outset. This is not done in the very beginning but is developed as you talk with them. I find that jurors do not like to be lectured nor do they want to be placed in uncomfortable positions. Some jurors may distrust lawyers and you

have to overcome this feeling. In order for a jury to want to help you, they must first like you. It is best to use conversational tones and words they understand. You should certainly let the jury know early on if you plan to ask for a substantial verdict. You cannot wait until the closing argument and spring this on a jury that considered your case to be just another lawsuit.

Be Flexible

You should alter your opening statement approach for different types of cases. For example, in a death case you might deal in your opening statement with the fact that your damages will be solely punitive and that the elements of punishment and deterrence are involved. The jury will hear the punishment argument by the Defendant - especially where you have individual Defendants - many times during the trial. It is advisable to explain the reason for the wrongful death act and the specific reason for punitive damages in your opening statement.

Products Liability Cases

In a products liability case you will need to define certain terms for the jury. They will need to hear and understand what they will later be called on to interpret. It is good to give them a feel for how a work place functions or how the involved product actually works. You must convey the message that the product designed and manufactured by the Defendant was dangerous and that the Defendant knew or should have known it. You should also alert the jury that experts will testify for you and the defense.

Fraud Cases

Fraud cases present a different situation. In a fraud case your opening statement will set the tone for the trial insofar as the bad conduct of the Defendants is concerned. It is easy to set an emotional tone in your opening remarks that will shock the jury and condition them for what is to come. Jurors distrust insurance companies about as much as they do lawyers. Use this to your advantage.

Motor Vehicle Collision Cases

Do not fall into the habit of giving the same opening statement in every motor vehicle collision case that you try. It is easy to do this if you try a good number of cases. You may find the defense lawyers picking up on phrases and statements you use over and over and using them against you. Alter your methods and try to make each opening statement stand on its own bottom. You will find that if you try to find something unique about a case, you will do an overall better job.

Time Restraints

It is critical to know what time restraints will be placed on you by the trial judge. Some judges may be unreasonable and limit your opening statement unduly. This is fortunately the exception rather than the rule. Good judges will let you try your case without injecting themselves unnecessarily into the fray as long as you follow the rules and play fair. If you are going to be placed within a very short time for your opening statement, you must alter your statement to fit the available time. There is nothing worse than being stopped in midstream at this juncture.

Use of Exhibits

I find it extremely useful to utilize charts, photographs, blow-ups of important records, and other exhibits during opening statements. If you have a model which will be used during trial, you should let the jurors see it at the outset. A good quality model will not only educate the jury, it will usually impress them. It is essential, however, that the model be accurate and not misleading in any manner. The more detail the better. Jurors will generally understand and remember what they see.

Rebuttal

I find it necessary to answer the Defendants in a rebuttal to their opening statement on occasion. Again, do not abuse this privilege since it can backfire on you. You should make this short and to the point. Unless it helps avoid the temptation to simply have the last word, stay seated.

Conclusion

A good opening statement will set the tone for your case. If you do poorly in the opening

statement it is possible to overcome it, but it will be much more difficult. On the other hand, a good, strong opening statement will set the tone for your case and generally will give you an advantage over the Defendant which you should keep throughout the trial.